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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Mitchell R. Swartz, Plaintiff,
Petitioner

v.

Schering-Plough Corporation, Plough U.S.A.,
Schering-Plough Healthcare Products,
Defendants,
Respondent

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

PETITION FOR A WRIT OF CERTIORARI

Mitchell R. Swartz, ScD, MD, EE
P.O. Box 81135
Wellesley Hills, MA 02481-0001

April 9, 2003

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46 pp

QUESTIONS PRESENTED

Whether the Court erred by denying equivalent applications of law.

Whether the Court erred by failing to comply with Judge Young's Order regarding "information" transfer.

Whether the Court erred by failing to comply with Judge Young's Order regarding Plough to answer the Complaint - or be found in Default.

Whether the Court erred by failing to comply with Judge Young's Order regarding the Adjoining of Dr. Berlin.

Whether the Court complied with the standards of review regarding whether Two Inventions Are Identical, Definition under 35 U.S.C. §102.

Whether The Court Erred By Ignoring That SUN-BUG Information Was Delivered To, Received By, Transmitted Within, And Discussed Internally At Plough.

Whether The Court Erred By Ignoring That Defendants Shared SUN-BUG Information With At Least Two Companies Proving Utilization.

Whether the Court erred by Ignoring the Court Order of December 1999 for Discovery was not Carried Out.

Whether the Court erred by ignoring that there Is Not A Conflict Regarding Dr..Berlin.

Whether the Court erred by denying access to a fair trial.

Whether the Court erred by being biased against Petitioner with respect to Rule 7.1.

Whether the Court erred by Ignoring Defendants' False Statements And Inconsistencies.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

The list of all parties in the proceedings in the court is as follows:

Petitioner, previously Appellant and Plaintiff: Dr. Mitchell Swartz, P.O. Box 81135, Wellesley Hills, MA 02481-0001.

Respondents: Schering-Plough Corporation, Plough U.S.A., Schering-Plough Healthcare Products,

The Respondent's attorneys of record are John J. Curtin, Jr., Sarah E. Mizner, Heidi A. Nadel, and Julia Frost Davies, **BINGHAM DANA**, 150 Federal Street, Boston, MA 02110.

The panel in the court of appeal, the United States Court Of Appeals For The First Circuit, No. 02-1001, are Judges Boudin, Chief Judge, Torruella, Circuit Judge, and Lipez, Circuit Judge.

**** - Plough evolved and after subsidiaries and mergers includes Schering-Plough and Schering-Plough Healthcare Products. Herein, the three Schering-Plough Defendants are for simplicity collectively called either "Plough" or "Schering-Plough".

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Supreme Court of the United States

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

[Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States court of appeals which appears at Appendix A in the present petition.

**** The Notations herein are to the Appendix of this Petition (e.g., App. A) and those made to the US court of appeals, in the Appeal Brief (e.g., AB12 for page 12), Appellant's Appendix (A123) or Addendum (AD12).

OPINIONS BELOW

The opinion of the court of appeals [United States court of appeals for the `First circuit] appears at Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under Federal question jurisdiction authorized by Article III [28 U.S.C. §1331], Article IV, and Article I Section 8 of the United States Constitution, and by the Tenth [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)) and the Fourteenth Amendments, and because the claim in the district court involves breach of contract filed against corporations located outside of Massachusetts (diversity). The mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III [*Marbury v. Madison*, 1 Cranch 137, 177 (1803), Chief Justice Marshall].

The date on which the court of Appeals decided Petitioner's cases was 9/24/02. A copy of the court's decision appears at Appendix A (App. A) in the present petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This court is the petitioner's last and only source of relief, and for reasons stated in detail below, the United States Supreme Court should consider examining whether to exercise its supervisory power .

This Petition involves a direct grant of authority because the court of appeals ignores that judgment, and a report upon which it is based, failed to apply the normal federal standards of review and failed to comply with federal law.

This Petition involves a direct grant of authority because the court of appeals ignores that the petitioner (then appellant) informed the court of important federal issues which far departed from the accepted and usual course of judicial proceedings, including inconsistency with previous decisions of two judges in the same case.

This Petition involves a direct grant of authority because the decision of the court of appeals did not discuss the substantive, serious and indelible issues cited in the submitted appeal, and reply, briefs.

This Petition involves a direct grant of authority because the court misapplied 35 U.S.C. 102, and provisions of Article I, §8, cl. 8 of the United States Constitution.

This Petition involves a direct grant of authority because of Article III, Article IV, and the Fourteenth Amendments. With Article III,the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III [*Marbury v. Madison*, 1 Cranch 137, 177 (1803), Chief Justice Marshall].

This Petition involves a direct grant of authority because of the Tenth Amendment [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The claim in the district court involves breach of contract filed against corporations located outside of Massachusetts and therefore Federal question jurisdiction is authorized by diversity.

Federal question jurisdiction is also authorized by Article III [28 U.S.C. §1331], Section 8, Article I of the United States Constitution, and the Tenth Amendment [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)). As Chief Justice Marshall has indicated, the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III (underlined for emphasis).

CONCISE STATEMENT OF MATERIAL FACTS

The Complaint in the District Court involves breach of contract filed against drug corporations located outside of Massachusetts (diversity). In his Memorandum and Decision, Chief Judge William Young, 6/17/1999 [hereinafter "Decision" (excerpt in Appendix "B", attached], denied Defendants' Motion to Dismiss said claim. Petitioner (plaintiff in the above-entitled action) is a Massachusetts inventor and physician. In 1975, while a medical student at Harvard and MIT, petitioner developed and invented a "dual protection" outdoor product called "SUN-BUG" to improve protection from sun exposure and some insects. The embodiment included the logo "SUN-BUG" and a formula of pure N,N-diethyl *meta*-toluamide at 10% [discussed on pages AB19, and AB5-AB9] sent to Plough which led to Schering Plough's knockoff BUG&SUN (A4,A5,A10,A65,A81)]. As reviewed in Appendix "D"

(attached), Petitioner became business partners with Dr. Robert Berlin to market SUN-BUG. [A8,A21]. Because of family associations between three of the four SUN-BUG business partners and both the founder of Plough (thereafter becoming the other corporate defendants), Mr. Abe Plough, and Mr. Harry B. Solmson (the son-in-law of the founder and eventual CEO of the company), the parties entered into a series of discussions which led to a contract entered into between the parties by their oral statements, acts and deeds between 12/75 and 4/76, and based upon long-standing good faith and trust (A1,A2,A11; also A1-A85).

Based upon the Agreement of confidentiality and trust, the SUN-BUG business partners sent SUN-BUG information to Plough (A8,A11,A21,A65,A81). Said transferred SUN-BUG information was examined and then discussed internally (A10, also A9,A11, A21; also A34,A65,A81,A55,A202,A231). Mr. Solmson's deposition admits that he shared the SUN-BUG technology with at least three individuals within Plough (A10, A36) and an individual at Coppertone (A10). Shortly thereafter, Mr. Solmson informed the SUN-BUG partners that the company declined to proceed at that point in time but if they decided to move ahead with SUN-BUG, then they would contact the SUN-BUG partners.

Thereafter, Plough did not adhere to the confidential Agreement regarding future use of SUN-BUG (A3-5). There were violations of the confidential SUN-BUG information transfer Agreement to Plough when Plough shared the SUN-BUG information with both Coppertone and Company "X". This is a breach. In addition, work at Plough also continued on SUN-BUG. Plough used the identical 10% N,N-diethyl meta-toluamide conveyed as information from petitioner to the respondents (A4,A5,A55). Plough's BUG&SUN is an identical knockoff of the individual inventor's SUN-BUG, in material identity, formula, in the angle between the side groups on the molecule, and even in the amount of that material present. Schering-Plough used and profited by the SUN-BUG information given to it without contacting petitioner or Dr. Berlin. This is a breach. Under the well-established standards for summary judgment, there are clearly genuine issues as to many material facts and that the defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)].

REASONS FOR GRANTING THE WRIT

I

Briefly, the gravamen of petition involves that the petitioner requests compliance with the 6/1999 Decision of Judge Young [A202,A231; *Swartz v. Schering-Plough Corp.*, 53F.Supp.2d95, 103 (1999)].

A. The court is inconsistent with Chief Judge William Young who ruled (A202,A231) that SUN-BUG "information" is relevant, that there was a two-part Agreement, and that Dr. Berlin and Dr. Swartz were partners who could pursue the contract claim, and that Plough was a defendant. The court allowed that petitioner could prove that there has been detrimental reliance on the promise of Mr. Solmson and Plough which by the standards of review should reasonably be enforceable as a contract to avoid injustice [Judge Young cited this noting [*Loranger Constr. Corp. v. E.F. Hauserman Co.*] 376 Mass. 757, 760-61, 384 N.E.2d 176, 179-80 (1978) (citing Restatement (Second) of Contract § 89B(2) & Illus. 6 (Tent. Drafts Nos. 1-7, 1973) and noting that this principle comports with "traditional contract theory antedating the modern doctrine of consideration."]. Furthermore, in Massachusetts as the court noted there is an implied covenant of good faith and fair dealing between the parties to a contract. The implied covenant of good faith and fair dealing means that neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 105, 346 N.E.2d 1251, 1257-58 (1977). Instead of complying with the decision, the respondents hired the law firm with which the Chief Judge was associated forcing his recusal, and immediately thereafter the respondents forced a *nunc pro tunc* rewording of said Decision (A177,A202,A231) altering said 1999 Decision [A202,A231] and changing the relevant word from "information" to "documents".

B. The court is inconsistent with normal standards of review because there is direct evidence that the SUN-BUG Group transferred the SUN-BUG technology to Plough pursuant to the confidential agreement which was based upon years of close family ties, long-standing trust, confidence and fiduciary responsibility. To counteract the substantial evidence of five (5) deponents who have confirmed SUN-BUG information transfer

(A9,A11,A21,A34,A65,A81, A55,A202,A231) followed by Defendants discussing said SUN-BUG information internally (A10), the Defendants' counsel took a "second bite of the apple" attempting to overturn Judge Young's Order and Memorandum. There is also direct evidence that after said transfer of said SUN-BUG information to Mr. Solmson et alia at Plough, the record reveals that the SUN-BUG information was utilized by the drug companies to make BUG&SUN. In this case, an offer of willingness to enter into a contract was made with the intent that the SUN-BUG business partners accepted, and then transferred the SUN-BUG information. This heralds acceptance of the offer, and given said transfer and receipt of said information, there was an agreement by fact [*Wilder v. Manley*, No. DCA924409H, 1994 WL 902879, at 3 (Mass. Super. October 7, 1 994)]. Plough should be held responsible for consequences of its acts including that it received a prolonged benefit from the SUN-BUG information, which continued even as the above-entitled action was filed.

C. The court is inconsistent with Chief Judge Young (A202,A231) because, regarding Dr. Berlin, the Defendants have systematically silenced the Decision of the Judge, denying Dr. Berlin the right to contribute to the above-entitled action [Mass.Gen.L. ch.108A,§9(1)(1998); *Wilder v. Manley* [No.CA924409H, 1994 WL 902879, at 3 (Mass.Super.Oct. 7, 1994)].

II

The court did not follow the standards of review or other decisions of the court by allowing summary judgment to proceed in light of the record below. A. Summary judgment is only proper after an adequate period for discovery [*Vaughn v. United States Small Business Admin.,65 F.3d 1322, 1325 n. 1 (6th Cir.1995)],* **which was not allowed in this case.**

B. Summary judgment is improper because petitioner demonstrated SUN-BUG information was transferred, discussed, and utilized by the Defendants, corroborated by submitted Affidavits and evidence in the record which convincingly supports genuine disputes over facts that will effect the outcome of the contractual claim. [*Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed. 202 (1986).] This is a "genuine issue" of such a nature that it is important within the prism of the J. Young's Decision of June 1999.

C. Summary judgment is improper because Defendants withheld records, and there was admitted spoliation of records. It would be a wiser course to proceed to trial [*Anderson v. Liberty Lobby, Inc.*].

D. Summary judgment is improper because of two (2) affidavits and testimony of five (5) deponents demonstrated genuine issues as to material facts proving defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)], especially within the prism of the J. Young's Decision of June 1999 [*Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir.1995)].

E. Summary judgment is improper because the Court relied upon affidavits of Defendants' counsel, whereas to support a summary judgment motion, an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir.1996); *El Deeb v. University of Minnesota*, 60 F.3d 423 (8th Cir.1995); *Leary v. Dalton*, 58 F.3d 748,754 (1st Cir.1995)]. Defendants' counsel "cherry-picked" portions of the Depositions to evade justice and therefore said affidavits are inaccurate and are not proper [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 LEd. 1312 (1950); *Tavery v. United States*, 32 F.3d 1423, 1426 n. 4 (10th Cir.1994); *Conner v. Sakai*, 15 F.3d 1463, 1471 (9th Cir.1993), cert. granted; *Toro Co. v. Krouse, Kern & Co.*, 827 F.2d 155, 162–63 (7th Cir.1987)]. Counsels' conclusory averments [*Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir.1996)] and self-serving statements [*Evans v.Technologies Applications & Serv. Co.; Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir.1991)] without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir.1991)] are improper. This is important because said affidavits were submitted under Rule 56(c) or Rule 56(f) in bad faith. The errors were noted by Plaintiff and were of a relevant substantial nature – including spoliation and withholding of evidence from a federal Chief Judge. A court should have held the Defendants in contempt and ordered them to pay reasonable expenses [*Evans v. Technologies Applications & Serv. Co.; Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508 (3d Cir.1994)] but has not.

F. Summary judgment is beneath the standards of review because the plaintiff filed an affidavit explaining the inability to

fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Col. v. Continental Casualty Co.*, 26 F.3d 1508 (10th Cir.1994). Therein, the plaintiff (now petitioner) made an extensive affirmative showing that defendants had made misstatements as to several material facts in issue and that they, by their own wrongful acts (such spoliation to which Mr. Solmson, in his deposition, admitted) have attempted to wrongfully defeat the plaintiffs claim. Accordingly, the plaintiff has shown competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *P. & JY. of Kingston. Inc. v. Massachusetts Commission Against Discrimination*, 20 F.Supp.2d 153, 155 (D.Mass 1998)] and to support the plaintiffs complaint. In this case, on the basis of the many irregularities in the Defendants' pleadings which were pointed out in detail to the Court, the Court should conclude that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 SCt. 1031, 92 L.Ed. 1347 (1948)].

QUESTIONS PRESENTED

Whether the Court erred by denying equivalent applications of law.

Whether the Court erred by failing to comply with Judge Young's Order regarding "information" transfer.

I

The Court has not followed the standards of review established by Judge Young's Order and Memorandum which accurately, precisely and substantively, discusses "information" and not merely documents, as the Defendants' counsel pretends and managed to get the report to rubber-stamp (A177,A202,A231). Judge Young specifically described, after he read the Complaint, the word: "information", and not "documents" or "delivery method", despite the fact that Defendants have repeated over and over that he did. By contrast, in the later erroneous rubber-stamped report, there results from this error numerous inconsistencies with the Decision and Order of Judge Young (A202,A231) and the standards of review (*supra,infra*). This rubber-stamping was obtained by Defendants' "second bite of the apple" and bad faith as they have tricked the court to ignore the Decision of Judge Young (1999) which precisely and accurately specifies and refers to "information". Why? The Report, with its change

of "information" to "*documents*" is clearly egregious because Mr. Solmson's deposition has revealed that Defendants routinely destroyed such documents after the information and ideas were received and discussed. Plough and Schering-Plough Defendants have had an *a priori* policy, a conspiracy among the drug companies, according to the deposition of the President of Plough, to glean submitted information and leave no written records. The systematic cover-up of submitted ideas by leaving no –apparent– written records would not be revealed until January 13, 2000. Defendants admit they discussed SUN-BUG with Dr. Berlin, and Mr. Solmson admits he discussed this among his staff extensively. Mr. Solmson also has reluctantly admitted that the Defendants systematically and routinely since the 1970s destroyed all written records of ideas received from outside the company. Given the transmission, discussion and sales, it can be inferred that Schering-Plough utilized the information supplied by Dr. Swartz.

II

It is wrong for the Court to adopt this language shift in midstream at the request of the Defendants because it is inconsistent with Judge Young's Order and Memorandum. It is wrong for the Court to adopt this language shift because the Defendants admitted in Solmson's deposition that Plough would routinely destroy documents associated with incoming product ideas. In this case, the SUN-BUG information transfer is a "genuine issue" of such a nature that it is important within the prism of J. Young's Decision of June 1999. In this case there is BUG&SUN with identical formulation, qualitative and quantitative, to SUN-BUG after the information transfer, and its distribution, and utilization (A3-A7).

Whether the Court erred by failing to comply with Judge Young's Order regarding Plough to answer the Complaint - or be found in Default.

The Report ignored Affidavits, Exhibits and Motions (A119,A128,A132,A136) and inaccurately purported, based upon rubber-stamping the Defendants' counsel's false statements to the court.

"*Abe Plough was the founder of Plough, Inc., now known as Schering-Plough Corporation.(sic)*"

[Report And Recommendation, 9/27/01]

A. Petitioner demonstrated in the Appeal Brief [pages AB31 and AB18] using evidence from the record below, that Plough

is a separate entity from Schering-Plough and from Schering. It is a "wholly-owned subsidiar(y)" and not "*simply the former name of Schering-Plough HealthCare Products, Inc.*" which the Defendants have inaccurately stated to the Court. Plough is a separate entity, with which Plaintiff interacted and to which the SUN-BUG information was sent (A9,A10,A55,A202), and which was hidden in the above-entitled action from discovery.

May it please the court that Plough's President, Mr. Mark Kirn, was served by a Sheriff, and the return was sent to the Court (A117). Mr. Kirn defaulted, but he is recognized by the Plough workers at "3030" -the location cited explicitly on page 33 of the sealed Supplemental Appendix "O"- as their President, and their published Memoranda use "Plough" as their name. Corroborating this, attention of the court is directed to page 33 of the sealed Supplemental Appendix "O". It can be seen that the address of the Defendants is exactly the location, "3030", which they originally reported did not exist. This is important because Defendants Schering-Plough Corporation and Schering-Plough Healthcare Products purport that Plough has not been in existence since 1990, but their Securities and Exchange Commission documents from 1994, 1996, and 1999, signed by the Defendants (A202,A231,A119,A128,A132,A136), indicate their statements to this court are self-serving but not accurate.

Whether the Court erred by failing to comply with Judge Young's Order regarding the Adjoining of Dr. Berlin.

After Chief Judge Young's Order, Dr. Berlin was allowed to be adjoined. Chief Judge quoted from *Wilder v. Manleo*, No. CA924409H, 1994 WL 902879, at 3 (Mass. Super. Oct. 7, 1994) (Lauriat, J.) ("As between the parties, the question of partnership or joint venture is one of intention that must be proved by an expressed agreement, either written or oral] , or be inferred from the acts or conduct of the parties.]. Dr. Berlin has a right to bring suit because "[e]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he/she is a member binds the partnership [Mass. Gen. L. ch. 108A, § 9(1) (1998)]. The court was unfair to demean him, and to stifle his voice, and to ignore his depositions and testimony.

Whether the Court complied with the standards of review regarding whether Two Inventions Are Identical, Definition under 35 U.S.C. §102.

To dismiss this case, the Report made grossly and egregiously inaccurate statements (supra), and relied on a cited patent of 1971 which was not mentioned in 1975 or thereafter until 2000, and involving neither SUN-BUG nor BUG&SUN. Furthermore, the Report misquotes the inaccurate statement of Defendants' counsel and then gives Schering-Plough credit for *"a product which dates back to the 1940s"* which also is neither SUN-BUG nor BUG&SUN.

> *"Schering has submitted the copy a patent for just such a product which dates back to the 1940s. (#171 ¶11; #172, Exh. G)"*
> [Report And Recommendation, 9/27/01]

THE TRUTH - The Cited Patent Is For Ethylene-Maleic Anhydride Copolymer

The Report erroneously presumes SUN-BUG and the cited patent(s) are the same, but they are not. The Defendants' cited patent teaches only the simplest ethylene-maleic anhydride copolymer solution, and is intended to, and does, serve a different purpose than does the formula and composition defined by SUN-BUG at 10% pure N,N-diethyl meta-toluamide –identical in the knockoff BUG&SUN. Defendants have shown no relevance of said patent or even assignment of said patent, or explained how it could violate a previous Agreement both *ex parte* and *nunc pro tunc*. The Report is therefore inconsistent with the standards of review which must be used when considering a patent (A55,A202,A231; and in the Appeal Brief on pages AB20-AB23).

Where was the suggestion of using pure N,N-diethyl meta-toluamide at 10% for prolonged outdoor use as engineered for SUN-BUG? Not in the cited patent. The cited patent does not suggest, allude to, or teach a composition, use, name, and structure as defined by SUN-BUG as should be apparent merely by considering toluamide in SUN-BUG (and its knockoff BUG&SUN). Furthermore, as discussed on pages AB24; also AB20-AB23, the patent is not assigned to Plough. Plough is not listed on the heading. There is no evidence that the cited patent is, or was, Plough's.

Furthermore, said patent was not mentioned in 1975 or 1976 or for decades thereafter. If Plough and Solmson had the patent at that time, then they would have cited it. They did not. Therefore, the Agreement must stand independent of any irrelevant, patent used by one party after the Agreement. Most importantly, the cited patents are not relevant because neither is the SUN-BUG formulation, concentration or product or the BUG&SUN formulation, concentration or product. The cited patent claims ethylene-maleic anhydride copolymer which is not relevant to SUN-BUG or it's knockoff BUG&SUN. By contrast, they use SUN-BUG's formula of pure N,N-diethyl *meta*-toluamide at 10% [discussed on pages AB19, and AB5-AB9; and which is identical to sample "DB" (7 grams) sent to Plough and to that contained in the knockoff BUG&SUN (A4,A5,A10,A65,A81)].

LAW

The Court has not followed the normal standards of review involving patents which are used when considering if two inventions are "identical" or "just such a product" (A55,A202,A231). The following three (3) examples are the normal standards of review. As discussed on pages AB22; also AB20-AB24, the standard of review involving patents, and the definitions of "identical" or "new", is discussed in *In re Arkely, Eardley and Long* [172 U.S.P.Q.524,526(CCPA, 1972)] (Appendix "C"). In this case, the cited patent is NOT the same. Therefore, the cited patent is not relevant and is relied upon improperly. This was forcefully stated in *Orthopedic Equipment Co. Inc. v United States*, 217 U.S.P.W. 193, 199 (CAPC 1983) (Appendix "C"). Finally, corroboratory proof that the cited patent leads away from SUN-BUG, is that the courts have affirmed that all claims must be used [Court of Custom and Patent Appeals, *In re Langer and Haynes*, 175 USPQ 169, 171 (CCPA 1972)](Appendix "C")..

Whether The Court Erred By Ignoring That SUN-BUG Information Was Delivered To, Received By, Transmitted Within, And Discussed Internally At Plough.

The Defendants' counsel falsely purported to federal judges (and the Boston Globe) that not a "*single piece*" of SUN-BUG information made its way from the SUN-BUG partners to Plough. However, there is significant, compelling evidence

from five (5) deponents who say that the SUN-BUG information was sent to, received by, discussed within, and used by, Plough. Despite the fact that the Defendants' counsel purported Chief Judge Young (and later Judge Gertner) that Plough knew nothing of SUN-BUG, many individuals at Plough (later the Schering-Plough) did know quite a bit. Plough got the SUN-BUG idea - from the SUN-BUG partners, with 10% N,N-diethyl meta-toluamide as the insect repelling portion (A4) as was discussed by Mr. Solmson within the company (A11,A81) and posted thereafter years later on the front side of each and every BUG&SUN bottle (A5).

As discussed in the Appeal Brief on pages AB5-AB7 and AB18, the SUN-BUG information transfer was confirmed by Ms. Solomon at her deposition, and by Ms. Berlin at her deposition, and by Dr. Berlin at his deposition. The SUN-BUG information was received by, examined at, and then discussed in, Plough (A10). Mr. Solmson widely discussed the formula and idea within Plough with four individuals (A36, A10) and the founder himself (A9-A34,A36,A202). Mr. Solmson shared the SUN-BUG information widely and internally within Plough, right up to the founder himself (A9-A34,A36,A202).

Corroborating the transfer of the SUN-BUG information is physical evidence in the form of the inadvertently leaked cover-sheets. As discussed in the Appeal Brief on pages AB30 and AB25-AB27, said cover-sheets [as Exhibits #151, 152, 250 and 251] were withheld; cf. A151]. However, they document a pedigree line beginning with Plaintiff's "SUN-BUG", mutating through "SUN&BUG", and finally arriving at the knockoff BUG&SUN (A1,A2,A149). Further corroborating the transfer of the SUN-BUG information, even though the Defendants erudite and eloquent counsel purported there was no knowledge of SUN-BUG, as discussed in the Appeal Brief on pages AB18 and AB5-AB9, on at least two occasions, SUN-BUG information was delivered (A9,A11). As discussed in the Appeal Brief on pages AB18, Mr. Solmson admitted discussing the SUN-BUG technology with Dr. Berlin (A44). All received papers were destroyed after the information was gleaned, according to Mr. Solmson.

The fact that each deponent knew of the information transfer (A9,A11,A21,A34,A65,A81,A55,A202,A231), and that the Defendants admitted receiving the SUN-BUG information

(A10), there is probative evidence to defeat summary judgment, because a jury would reasonably find in the Plaintiff's favor [*Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 248-52, 106 SCt. 2505, 2510-12, 91 L.Ed.2d 202 (1986)]. In fact, given the Defendants' withheld records, and destroyed records, and their prolonged and systematic attempts to shift "information" to "documents", it is a wiser course to proceed to trial [*Anderson v. Liberty Lobby, Inc.*].

Whether The Court Erred By Ignoring That Defendants Shared SUN-BUG Information With At Least Two Companies Proving Utilization.

After the Agreement for confidentiality, the SUN-BUG information was sent to, and received by, Plough. The confidential information was then shared with, at least, the third and fourth parties [Coppertone (A10,A36) and Company "X" (infra)]. When Plough became Schering-Plough Healthcare Corp., the company again shared the confidential SUN-BUG information with Company "X", corroborated by the sealed Supplementary Appendix "O". Therefore, Defendants, violating the Agreement, leaked the SUN-BUG information to [at least] third and fourth parties after the Agreement with the SUN-BUG partners. Instead of honoring the trust and confidence promise made between the founder and President and the four SUN-BUG business partners, Plough elected to breach the Agreement, and produced the SUN-BUG product on its own, through Company "X" whom they claim is a "third (sic) party".

The Defendants (then Appellee's) inaccurately stated:
"... *when Schering-Plough finally did introduce Bug & Sun, the formula was in part licensed from a third (sic) party.*"
[Appellee's Brief]

THE TRUTH - The Sun-Bug Information Was Leaked By Defendants And Then Utilized

Schering-Plough Defendants' sealed Supplementary Appendix includes new documents, previously withheld from the Plaintiff. Supplementary Appendix "O", demonstrates, that Plough did not like the exact formulation "offered" by Company "X" (Exhibit "A", page 36), but insisted on the SUN-BUG partners' precise concentration and formulation of 10% (Page 11, Section 4). This is shown on page 11 where Plough asked Company "X" to make for Plough, not Company

"X"s concentration of 30%, but the SUN-BUG formulation of 10% N,N-diethyl *meta*-toluamide. Their late-revealed sealed Appendix "O" demonstrates that the Defendants preferred and revealed the exact precise SUN-BUG insect formulation concentration to Company "X", a further breach.

LAW

Mr. Solmson's affidavit and deposition are evidence. Solmson finally admitted to receiving the SUN-BUG information, speaking about it, and transferring it to at least four individuals within the company and apparently one person outside of the company as well. BUG&SUN is a SUN-BUG knockoff from name to design to product formulation, and now Supplemental Appendix "O" demonstrates that Plough wanted that precise SUN-BUG formulation, rather than that which Company "X" suggested (Exhibit "A", page 36). The identical formulation and concentration, differing from Company "X" (supra), is consistent with the Plaintiff's complaint. Given the transfer and receipt of the confidential SUN-BUG information, its discussion in Plough, in Coppertone, and Company "X", and the utilization of the SUN-BUG information, Plough and he SUN-BUG business partners reached a valid, binding, and enforceable agreement.

For the Plaintiff, there has been detrimental reliance on the promise of Mr. Solmson and Plough, because he gave up something of value, and the defendants promised to give up something of value. The promise, detrimental reliance, should reasonably be enforceable as a contract to avoid injustice as Judge Young wrote [also *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 760-61, 384 N.E.2d 176, 179-80 (1978)] noting that this principle comports with "traditional contract theory antedating the modern doctrine of consideration."].

There is a presumption of good faith and fair dealing [*Wilder v. Manley*] which means that neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract [*Fortune v. National Cash Register Co.*, 373 Mass. 96, 105, 346 N.E.2d 1251, 1257-58 (1977)]. Therefore, as a matter of law, the defendants had an Obligation to account honestly and honor their

agreements but have failed to so do. Because a contract is not to be held unenforceable if, when applied to the transaction and construed in the light of the attending circumstances, the meaning can be ascertained with reasonable certainty [*Doyle v. Hasbro*, 103 F.3d 186, 190 (1st Cir. 1996)], Plough should be held responsible for consequences of its acts [*Coll v. P.B. Diagnostic Systems, Inc.*, 50 F.3d 1115, 1122 (1st Cir. 1995); *Pultorak v. Lupien*, 1994 WL 902909 *2 (Mass. Sup. Ct., Oct. 11, 1994)]. The Defendants have failed to reply to Appellant's request that they cite law that permits their contract with a third (sic) party to void their previous contract *nunc pro tunc* even though consent of the previous parties was not obtained.

Whether the Court erred by Ignoring the Court Order of December 1999 for Discovery was not Carried Out.

Discovery was blocked by the Defendants' counsel. Notices of deposition were sent pursuant to both Judge Young's and Judge Gertner's Orders (A87,A95,A103). All of Plaintiffs efforts, including after he hired counsel, were sabotaged. In September 1999, the Plaintiff again made an effort to begin discovery. The Defendants refused. Thereafter, the Court Order of December 1999 ordered that Plaintiff be allowed to conduct discovery and to take 30(b)(6) depositions of the Defendants. Plaintiff made an effort to take discovery but Defendants opposed, obstructed and then evaded discovery by deposition. In the first months of 2000, the Defendants simply refused. At that time the official Court Order was not sent to Plaintiff, who repeatedly called both the Court, and then the Defendants' counsel, over two months asking for a copy of the Order. Neither provided it. It was only shared with the Defendants. Only on May 2, 2000, did Plaintiff finally receive by fax a copy from the Defendants. To Plaintiff's astonishment, the Order had been signed December 20, 1999, yet no official and timely copy of the Order was ever received by Plaintiff. On May 18, 2000 and then on May 19, 2000, Plaintiff again gave Notice of Deposition to the Defendants. The Defendants refused to provide the requested information necessary for a 30(b)6 Deposition. The Defendants failed to supply the requested addresses of key witnesses such as Barbara Carter or W H Chambliss. Meanwhile the Plaintiff cooperated with the Defendants. Plaintiff provided the addresses and telephone numbers of Dr. Berlin, Ms. Berlin, and Ms. Solomon to the Defendants' counsel and their four

depositions. There was never any similar reciprocity or cooperation by the Defendants.

Despite the Notice, on June 1, 2000, each of the Defendants scheduled for Deposition failed to properly appear with full, complete, and appropriate records as specified by the duly-received Schedule "B" for a deposition. They had defied J. Gertner's Court Order by a last minute May 30, 2000 letter indicating they would not appear, just as they had refused in 1999 and early 2000. Therefore, on June 1, 2000, Plaintiff filed a Motion for Compelling Order and Sanctions when the Defendants failed to show up for the sixth time. This was later covered up in its entirety by J. Collings, who essentially voided J. Gertner's Discovery Order (The lack of evenhandedness is discussed below).

Plaintiff notified and requested Defendants Schering-Plough Corporation and Schering-Plough Healthcare Products that their discovery depositions be taken on June 10 and June 11, 2000 (sixth attempt by Plaintiff). Instead of compliance, the Defendants' counsel refused, hung up the telephone, and then began their Motion for Sanctions against the Plaintiff which were intended to obfuscate the fact that they had disobeyed the Order of Judge Gertner. Instead of working with the Plaintiff for justice and reciprocity (the Defendants had at this point conducted five depositions with which the Plaintiff had complied), the Defendants attacked the Plaintiff. Judge Collings, whom the Plaintiff had previously appealed under Article III, came back into the case to protect the Defendants and deny Plaintiff even the appearance of justice. J. Collings unfairly awarded the Defendants sanctions against the Plaintiff even though the Plaintiff had complied and the Defendants had not. He unfairly and unjustly allowed the Defendants Motions while denying the 6/12/00 Motion for Sanctions against Defendants for failing to appear for any deposition.

To facilitate discovery, Plaintiff hired Attorney Evans Carter, however, the Defendants successfully squirmed out again. Discovery closed on September 1, 2000. The Defendants did not provide the requested required information necessary for a 30(b)6 Deposition and failed to comply with scheduling. There was no reciprocity. The Defendants failed to appear for, or accommodate, or schedule, their own Depositions over many months even after conducting four (4) Depositions for their side

in three (3) states. Furthermore, two of the Defendants' depositions involved sudden rescheduling by the Defendants leading to costly extra travel expenses for the Plaintiff. The Defendants were inflexible. Plaintiff offered them numerous opportunities for limiting the number of depositions, but the Defendants exploited the matter, attacked the Plaintiff, and ultimately refused. Defendants counsel always refused to give names, refused to give critical addresses and telephone numbers, and refused to give firm dates, instead they scuttled the depositions the "night before" (A116).

LAW

As noted on pages AB9-AB14 of the Appeal Brief, the standards of review were not followed [*Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir.1973), *LeGrice v. City of Brockton*, 99-10535, (D. Mass. July 13, 2000), *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla.1995), and *Hickman v. Taylor* (1947) 329 U.S. 495, 507)]. Defendants have failed to provide law to support their failure to cooperate in discovery (A86-A103) even though the Orders of Judge Young and Judge Gertner required them to do so. Even when Plaintiff retained Attorney Evans Carter to conduct a 30(b)6 deposition, did the court fail to enforce its own previous Orders and Decision. Given the funding of the court by the Defendants it has the appearance of impropriety.

The Court has not followed the standards of review, as discussed in the Appeal Brief on page AB30, where Appellant, cited *Multi-Core, Inc. v. Southern Water Treatment Co.*, 139 F.R.D. 262, 264 (D. Mass. 1991) because Plaintiff has a right to examine the appropriate relevant requested documents because they are material and will help prove Plaintiff's case. However, in this case, the Orders of Chief Judge Young and Judge Gertner were obstructed, impeded and then stopped by Decisions by a magistrate judge, in response to the petitioner protesting his action. The magistrate judge allowed zero (0) Discovery Motions of Plaintiff even when petitioner pointed out that Defendants failed to provide law to explain why they withheld key relevant documents, including those requested, critical and relevant, documents which follow and precede numbers Defendants' exhibits sheets #151, 152, 250 and 251 (A151 especially, also A87,A92,A157). On the sheets are the words, "SUN&BUG" – and not BUG&SUN, proving that there was a

pedigree line from SUN-BUG to BUG&SUN. These are critical and relevant. They and the documents which lead to them are important – but have never been seen by the Plaintiff. Defendants' withholding of documents which are critical and material to the case is unreasonable, and crafted only to prevent a fair trial [*Braaten v. Deere & Co.; Nastrom v. Nastrom; Multi-Core, Inc.*]. Plaintiff has a right to examine the appropriate relevant requested documents because they are material and will help prove Plaintiff's case.

The Court has not followed the standards of review because the denial of evidence and depositions of the Defendants is a salient denial of a fair trial by the Defendants. This is proven because normally, the Court has substantial interest in pretrial discovery to facilitate the search for truth and promote justice (*Hickman v. Taylor* (1947) 329 U.S. 495, 507). It is an affront to the judicial process to subvert and delay justice by denying Plaintiff access to material evidence and to depose Defendants.

The Court has not followed the standards of review because the Court Order of December 1999 ordered that Plaintiff be allowed to conduct discovery and to take 30(b)(6) depositions of the Defendants. Furthermore the magistrate judge acted unfairly and harshly improperly penalized a *pro se* Plaintiff knowing full well that said Plaintiff was only attempting to comply with Order of December 1999. That this occurred after Plaintiff filed an Appeal [00-1830] citing Article III and violation of said Discovery Order suggests that thereafter there has been a systematic appearance of retribution, law misapplied (and in one direction only), and therefore a possible appearance of impropriety.

The Court has not followed the standards of review because the Plaintiff properly filed the notice of deposition [*Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir.1973)] stating the time and place for the deposition and the name and address of the person to be examined [Fed. R. Civ. P. 30(b)(1)], and further specified the areas of inquiry with reasonable particularity relevant to the present Complaint [*Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121 (M.D.N.C. 1989)]. The Defendants failed to cooperate in said discovery and have delayed justice by denying Plaintiff access to material evidence in salient violation of Federal Rules Civil Proc. 1 and 26 (A86-A103). The Defendants should not have been systematically excused from

appearing for deposition through their continued non-cooperation [*LeGrice v. City of Brockton*, 99-10535, (D. Mass. July 13, 2000); also King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla.1995)].

The summary judgment under Rule 56 is improper because the Plaintiff filed an affidavit explaining the inability to fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Cob. v. Continental Casualty Co.*]. The Court has not followed the standards of review because discovery was not complete without the implementation of Judge Gertner's Order. Plaintiff has a right to examine the appropriate relevant requested documents and depose Defendants about these issues because they are material and will help prove Plaintiff's case. [*Ares-Serono, Inc. v. Organon Intern. B.V.*, 151 F.R.D. 215 (D.Mass. 1993)]. Egregiously, the incomplete discovery did occur in the light of Defendants' history of destruction of documents, withholding key documents, the refusal to attend depositions, and the filing of obfuscating Motions against the Plaintiff to prevent a fair trial [*Braaten v. Deere & Co.*, Inc., 1997 ND 202, ¶9, 569 N.W.2d 563; *North Dakota Supreme Court Opinions, Nastrom v. Nastrom*, 1998 ND 142, 581 N.W.2d 919 Filed July 16, 1998]. Thus, petitioner has been restrained [*Turmenrte v. White Consolidated Indus., Inc.*, 266 F. Supp. 35, 37 (D. Mass. 1967); also *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 419 (E.D. Wis. 1978)].

Whether the Court erred by ignoring that there Is Not A Conflict Regarding Dr. Berlin.

Defendants' counsel made false statements about Dr. Berlin unsupported by the pleadings (A81,A202,A231,A55,A11) but made for innuendo and *ad hominem* by the Defendants' counsel, falsely made because the Defendants' cannot rebut Dr. Berlin's (and the other deponents') testimony (A81,A202,A231,A55,A11), or the fact that he was referring to other depositions which corroborated his earlier affidavit. By taking portions of Dr. Berlin's pleadings out of context, the Defendants counsel creates pseudo-conflict where there is none, to trick the court. There is only a difference in the description of those pleadings by the Defendants attorneys. The purported "*contradiction*" involves Dr. Berlin repeating Ms. Solomon's statement, and in the other case he reported what was told directly to him.

These two recitations are not contradictory, despite that they were taken out-of-context to create that impression. Dr. Berlin refreshed his memory between the time of his first affidavit in April 1999 and his third affidavit more than two years later. Dr. Berlin read, and did refer to, the depositions of Ms. Solomon, Ms. Berlin and Mr. Solmson. Dr. Berlin described an event from different viewpoints (his and Ms. Solomon). In one case, Dr. Berlin repeated what was told the business partners by Ms. Solomon, and in the other case reported what was told to him. They are not contradictory, but have slickly been taken out of context to create that impression by the Defendants' counsel. In fact, the evidence (A36,A202,A31) shows that it is Mr. Solmson and Plough and the other Defendants who have conspired and acted egregiously -- and have submitted documents in a contradictory fashion to obstruct and delay justice.

The innuendo and *ad hominem* by the Defendants' counsel was made because the Defendants have failed to be substantive and detailed any other purported contradictions. Thus, they have refused requests to be precise and substantive because their misstatements are simply unsupported by the pleadings (A81,A202,A231,A55,A11) and there are no significant differences between any of the testimonies of Dr. Berlin. Corroborating this, Defendants have failed to reply to the fact that there was incredible trust and confidence between three of the SUN-BUG business partners and Plough through family relations to both Mr. Abe Plough (founder) and Mr. Harry B. Solmson (President of the Plough company) over several generations, confirmed by five depositions (A8,A11, Dr. Robert Berlin; A21, Ms. Solomon Marks; A65,A81, Mr. Harry Solmson).

In 1975, only on the basis of said trust and confidence, were Mr. Plough and Mr. Solmson able to shepherd four young adults to deliver and entrust the confidential SUN-BUG information to Plough. Thereafter, good faith required Plough, and later Schering-Plough, to act fairly (A1,A2), to keep the information confidential, and to conclude the second agreement for licensing, as discussed in Judge Young's Decision.

LAW

The Court has not followed the standards of review because Plaintiff's pleadings which introduced the affidavit gave a satisfactory explanation of why the testimony differed. Corroborating this, the Defendants' affidavits are not even proper pursuant to Rule 56(e) because they are based on Defendants' counsels' inaccurate statements [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.; Tavery v. United States; Conner v. Sakai; Toro Co. v. Krouse, Kern & Co.*], conclusory averments [*Cifarelli v. Village of Babylon*], and self-serving statements [*Evans v.Technologies Applications & Serv. Co.*; Hall v. Bellmon] presented without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*].

The Court has not followed the standards of review because in that the record is evidence [affidavits, depositions of five (5) deponents] which supports the Plaintiff's and Dr. Berlin's statements (A55, A020) and presents a sufficient disagreement to require its submission to a jury [*Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir.1995)]. Under the well-established standards for summary judgment, there are clearly genuine issues as to many materia. facts and, therefore, the defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)].

The Court rejects the reasoning of the Appeals Court [*Marino v.Hyatt Corporation*, 793 F.2d 427, 430 (1st Cir. 1986)]; *Morrill v.Tong*, 390 Mass. 1207 129 (1983); *Chelebda v.H.E. Fortuna & Brothers Inch*, 609 F.2d 1022 (1st Cir. 1979)]. The Court's allowance of Summary Judgment is inappropriate because the Court has relied upon affidavits of Defendants' counsel, whereas to support a summary judgment motion, an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.; Leary v. Dalton*]. Plaintiffs affidavits set forth facts that would be admissible at time of trial, and establishes each of the affiant's competence to testify. Affiants of the Plaintiff were witnesses, and unlike the Defendants' pleadings, Plaintiffs affidavits have been based on personal knowledge.

The Court has not followed the standards of review because Defendants' argument relies on a case of two people involved

with the sale of land [*Held v. Zamparelli*, 13 Mass. App. Ct. 957 (Mass. App. Ct. 1982)]; a case not relevant to this case where there are decades of trust and confidence between the highest levels of Plough [Founder and the President] and three of the SUN-BUG business partners. Their cited case is devoid of that essential relationship. Furthermore, in the Appellee's new arguments made to the ONLY court of appeals and not in the court below, the legal case upon which the Defendants rely is one where the court excluded a later affidavit because the opponent had "no memory" [*Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993)]. The court should reasonably recognize that there are significant and salient differences. First, there is quite a different situation in this case where Dr. Berlin significantly remembered details in his initial affidavit. Second, there were long-standing relationships of trust and confidence between the parties in this case. Third, Dr. Berlin's comments have been corroborated by five depositions. Fourth, Dr. Berlin had the opportunity to further refresh his memory through the depositions of Ms. Solomon and Mr. Solmson, to which he did later refer.

The Court has not followed the standards of review because attention of the court is directed to the sealed Supplemental Appendix "O". It can be seen that the proposed royalty to Company "X" is exactly the same as that royalty reported to Ms. Solomon and discussed by Dr. Berlin. This further corroborates the accuracy of Dr. Berlin, and further explains why the Defendants' want to eliminate his testimony.

The Court has not followed the standards of review [*Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994), *Torres*, 219 F.3d 13, 20-21 (1st Cir. 2000)] and so there is an abuse of discretion and an appearance of impropriety by having only Dr. Berlin's testimony struck.

Whether the Court erred by denying access to a fair trial.

The Court has not been impartial because it has ignored that SUN-BUG information was sent to Plough. The Report's statements are contradicted by the five depositions (A55,A8-A81,A202,A231), by the confirmation that confidential SUN-BUG technology was transmitted (A9,A10,A55,A202), and even by the knockoff equivalence of SUN-BUG to BUG&SUN. Schering-Plough Corporation, Plough U.S.A., and

Schering-Plough Healthcare Products, did reap what they did not sow. The Court has not been impartial because the erroneous Judgment is based upon Defendant's false statements and perjury. This is not supremacy of law. The Defendant Plough has not even had to answer this Court or to appear for a deposition. Defendants' actions have frustrated and hindered efforts to maintain Court orders and the decision of J. Young. Defendants have exhibited abuse of both due process and power [*Gamez v. Toledo,* 100 S. Ct. 1920]. Summary judgment under Rule 56 is improper because it is predicated upon Solmson's testimony and Defendants' counsels' affidavits submitted under Rule 56(c) or Rule 56(f) in bad faith (A231).

Whether the Court erred by being biased against Petitioner with respect to Rule 7.1.

The *pro se* Plaintiff had to comply with rule 7.1, whereas the defendants counsel need not even comply with rule 7.1 at all. The magistrate judge made denials made for lack of compliance with Local Rule 7.1 (A87). The unfairness of the court regarding Local Rule 7.1 (A87) was discussed in the Appeal Brief on pages AB45 with specificity. He wrote on the left hand side of each Motion: **"None of the motions contain the certification required by the law"**. Astonishingly, this was never required for any of the Defendants' counsels' Motions, including their obstructive and abusive Motion for Sanctions. As a result, all of the Plaintiffs motions were denied for purportedly failing to comply with Local Rule 7.1 (A87), but in contrast none of the defendants motions –including those which awarded sanctions against the Plaintiff for false statements made by the defendants counsel– were ever submitted in compliance with said rule. The court went beyond discretion to exclude Dr. Berlin's pleadings yet include those of Mr. Solmson [when there was an unfounded allegation made against Dr. Berlin, whereas it was Mr. Solmson who was contradictory in each pleading], as discussed in the Appeal Brief on pages AB33. Further unfairness results from the fact that the defendants have not had to provide specific, precise, detailed evidence.

Whether the Court erred by Ignoring Defendants' False Statements And Inconsistencies.

The Court has not followed the standards of review because it has ignored, and adopted, the disingenuous statements of

Mr. Solmson and Defendants' counsel as to several material facts in issue. These were made in light of defendants' spoliation of evidence. The inaccuracies were brought to the attention of the Court with an extensive affirmative showing of said misstatements and therefore the summary judgment under Rule 56 is improper because it is predicated upon Defendants' affidavit and pleadings submitted under Rule 56(c) or Rule 56(f) which were presented in bad faith (A231).

The Defendants misled the court in April 1999, when Defendant's counsel argued that Mr. Harry Solmson was too old and too senile to be contacted, that he was "*unavailable*", and that he had no knowledge of Dr. Berlin or SUN-BUG. These statements, like so many others by the defendants' counsel thereafter, were not true. As revealed by Dr. Robert Berlin in his Declaration, and confirmed at Deposition, Mr. Solmson - thereafter - was at that time in contact with the mother of one of Plaintiff's witnesses and the mother-in-law of Dr. Berlin. Dr. Berlin brought to the Court's attention that Mr. Solmson had the time and good health to meet with Ms. Berlin's mother, conveniently just before the Deposition of Ms Berlin in this case. Plaintiff sent to the Court documents that demonstrated Mr. Solmson was OK and had recently visited Plough in 1999. As Mr. Solmson stated in Plough's newsletter, "*I am doing OK for one who will be 88 next month. We had a great group of people at Plough, Inc., and I miss them*".

The Defendants then misled the court claiming there was no close relationship. However, the Defendants' statement was untrue, as revealed by Dr. Robert Berlin, Ms. Berlin, Ms. Solomon and even at the deposition of Mr. Solmson. As the depositions showed, both Plough President Harry Solmson and the founder (Mr. Abe Plough) attended the wedding of two of Plaintiff's business partners: Mr. Solmson admitted that he was deeply involved in financial issues of two of the partners. There was incredible trust and confidence from the founder and President who shepherded four relatively naive young adults to entrust them with the confidential SUN-BUG information.

Proven disingenuous, the Defendants then deliberately misled the court claiming there was no company knowledge of SUN-BUG or Dr. Berlin. The Defendants continued this deception in their "Answer" to the Complaint, when on June 28, 1999, in their paragraphs 6 and 7, they purported to have no "*knowledge or information*" of Plaintiff's business partners or of

SUN-BUG. These of Defendants' statements were also untrue. Despite the lame claims of *"no knowledge"*, both the President of Plough (Mr. Harry Solmson) and the founder of the company (Mr. Abe Plough) attended the wedding of two of Plaintiff's business partners, and Mr. Solmson would soon admit in deposition that he was deeply involved in financial issues of the two of the partners.

Proven disingenuous, there followed serious important inconsistencies in Mr. Solmson's Deposition. Mr. Solmson first claimed he did not speak to Dr. Berlin on the telephone (A36,A11,A81) but then admitted that he had learned about SUN-BUG from Dr. Berlin and that, in fact, Mr. Solmson had called Dr. Berlin (A43). Despite the false statements by Defendants counsel, Dr. Berlin and Mr. Solmson remember speaking to each other about SUN-BUG more than once. Dr. Berlin remembers the rank of those to whom he spoke, and it has been corroborated by Solmson. Defendants' counsel then misstated the truth to the magistrate judge [pages 32, lines 13-19 of the Transcript from the 12/8/99 Hearing] when Defendants' counsel falsely claimed there were *"no papers"* in this case, *"no documents with (Plaintiff's) name or any of his business partners..."*. This was again untruthful. Defendants were sitting on Mr. Solmson affidavit prepared 6/99 but which would not released to the Plaintiff until twenty-four hours or less before Mr. Solmson's deposition in 1/00]. When caught in their last misstatement to the federal court, the Defendants' counsel purports in new argument to the appeal court that Mr. Solmson had no authority. That is ludicrous. Mr. Plough founded the company, and Mr. Solmson was the President of the company -- and Mr. Plough's son-in-law. That is false and *ad hominem*.

There has not been a normal standard of review because the court used a double standard of review, where the *pro se* witness is held to a higher standard than Mr. Solmson [who was protected by three (3) law firms [Bingham-Dana, the Defendants' internal counsel, and his own legal firm in Florida]. Mr. Solmson and Defendants counsel have systematically given the Court false information. Accordingly, the plaintiff has shown competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co., P. & JY. of Kingston. Inc. v. Massachusetts Commission Against*

Discrimination] and to support the plaintiffs complaint. In this case, there is two-tier system which allows Mr. Solmson's inaccuracies and contradictions to be ignored, and Dr. Berlin's clear testimony to be dismissed is inconsistent with U.S.Rep, 404, 520-521 (1972), as Appellant cited on page AB46 of the Appeal Brief

The court should have concluded that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*]

There has not been a normal standard of review and there is an apparent abuse of discretion for the court did exclude Plaintiffs' witnesses with specificity of charges, and ignore the previous Decisions and discovery orders. In this case there has been systematic abuse of discretion. [*Torres v. E.I. Dupont De Nemours & Company*, 219 F.3d 13, 21 (1st Cir. 2000) (quoting *Lennon v. Rubin*, 166 F.3d 6, 8 (1st Cir. 1999) (in turn, quoting *EEOC v. Green*, 76 F.3d 19, 24 (1st Cir. 1996)).] This is evidence that the lower court has two different standards of review is salient mathematical proof of bias, with the appearance of possible impropriety.

Whether the Court erred by ignoring Inequitable Conduct.

After Chief Judge Young's Decision, the defendants hired the law firm with which the Judge consulted or had worked, and the judge was forced to recuse himself. Thereafter, because of said action of the defendants, the court was not guided by Judge Young's Decision. Thereafter, Plaintiff was not given opportunity for defaulting a non-responding defendant, was not allowed discovery, and was punished as a *pro se* litigant even though defendants admitted to destroying records, withholding the Solmson affidavit (while being disingenuous to the public through the *Boston Globe* of which they are counsel) and have given disingenuous testimony with impunity to several judges (*supra*).

CONCLUSION

The petitioner has shown noncompliance with the standards of review in summary judgment. Two key issues of material fact prove that outcome should have been determined by jury rather than fiat.

A valid, enforceable contract was entered into between the parties by their oral statements, acts and deeds between December, 1975 and April, 1976 (A1-A85). Schering-Plough followed by reaping what it did not sow by selling an exact utilization of the SUN-BUG information (A4,A5,A55) – identical to SUN-BUG, in formula and amount, even down to the angle between the side groups on the molecule (A4-A7).

The cited patent was about ethylene-maleic anhydride copolymer and has nothing to do with SUN-BUG or BUG&SUN. Thus, the petitioner did show competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *P. & JY. of Kingston. Inc. v. Massachusetts Commission Against Discrimination*, 20 F.Supp.2d 153, 155 (D.Mass 1998)] because the Defendants are not entitled to judgment as a matter of law.

The record shows noncompliance with the standards of review because Judge Young set up guidelines involving "information" transfer and whether Dr. Berlin could have been a party in the present action to make his voice heard. The final judgment is not compliant with said 1999 Decision and gives no reason for the change. This has the appearance of impropriety because the petitioner came forward with significant evidence and a demand for jury trial of the issues [*In re Ralar Distrib. Inc.*, 4 F.3d 62, 67 (1st Cir. 1993); *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1195 (D. Mass. 1990)] supported by submitted, substantive, significant and probative evidence and testimony in the record, thereby requiring its submission to a jury [*Jeffery v. Sarasota White Sox*, Inc., 64 F.3d 590, 594 (11th Cir.1995)]. The petitioner submits that the law and the Decision of Judge Young should be upheld because said jury would reasonably find in the Plaintiff's favor [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52, 106 SCt. 2505, 2510-12, 91 L.Ed.2d 202 (1986)].

The record shows noncompliance with the standards of review because the court has elected to avoid accountability and ignore Defendants' tardive admission of destruction of documents, and the record which proves withholding of a key document, refusal to attend deposition, and the slick use of obfuscating Motions, all designed to shift "information" to

"documents" and to prevent a fair trial [*Braaten v. Deere & Co., Inc.*, 1997 ND 202, ¶9, 569 N.W.2d 563; North Dakota Supreme Court Opinions, *Nastrom v. Nastrom*, 1998 ND 142, 581 N.W.2d 919 Filed July 16, 1998]. In this light, the court should conclude that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 SCt. 1031, 92 L.Ed. 1347 (1948)] because the submitted Affidavits and the evidence in record supports genuine disputes over facts that will effect the outcome of the contractual claim [Anderson v. Liberty Lobby, Inc.].

The record shows noncompliance with the standards of review because the petitioner's counsel (at the time) filed an affidavit explaining the inability to fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Colo. v. Continental Casualty Co.*] and failure of the court to uphold Judge Gertner's discovery Order. Thus, summary judgment is not proper because of the one-sided allowance of discovery and inadequate period for discovery [*Vaughn v. United States Small Business Admin.*, 65 F.3d 1322, 1325 n.1 (6th Cir.1995)] and because petitioner has a right to examine the appropriate relevant requested documents and depose Defendants about these issues because they are material and will help prove Plaintiff's case [*Ares-Serono, Inc. v. Organon Intern. B.V.*, 151 F.R.D. 215 (D.Mass. 1993); also *Turmenrte v. White Consolidated Indus.*, Inc. 266 F. Supp. 35, 37 (D. Mass. 1967); and *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 419 (E.D. Wis. 1978)].

The record shows noncompliance with the standards of review because the Court did not follow the standards of regarding discovery. It was never even-handed.

The record shows noncompliance with the standards of review because the court has used Defendants' counsels' misstatements and "cherry-picking" of portions of the Depositions to evade justice. Such affidavits which are inaccurate are not proper [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 LEd. 1312 (1950); *Tavery v. United States*, 32 F.3d 1423, 1426 n. 4 (10th Cir.1994); *Conner v. Sakai*, 15 F.3d 1463, 1471 (9th Cir.1993), cert. granted; *Toro Co. v. Krouse*, Kern & Co.,827 F.2d 155, 162–63 (7th Cir.1987)]. Furthermore, such conclusory averments

[*Cifarelli v. Village of Babylon*,93 F.3d 47, 51 (2d Cir.1996)] and self-serving statements [*Evans v.Technologies Applications & Serv. Co.; Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir.1991)] without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir.1991)] are improper.

The record shows noncompliance with the standards of review because the court has shown unfairness by ignoring the inconsistencies in Mr. Solmson's pleadings and unfairly removing Dr. Berlin's pleadings. This is wrongful because an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir.1996); *El Deeb v. University of Minnesota*, 60 F.3d 423 (8th Cir.1995); *Leary v. Dalton*, 58 F.3d 748,754 (1st Cir.1995)]. By contrast, petitioner's Affidavits were ignored, and should have been taken as true (*Lewis v. Bours*, 119 Wn.2d 667, 670 (1992)) because the evidence far exceeded all requirements [*Droukas v. Divers Training Academy*, 375 Mass. 145, 159 (1978); *Marino v. Hyatt Corporation; Morrill v. Tong; Chehbda v. H.E. Fortuna & Brothers*]. In this light, and the prism of J. Young's previous Decision, the court was obligated to mention and discuss petitioner's, petitioner's lawyer's, and Dr. Berlin's comments, but did not. If there had been fair standards of review said submitted Affidavits and content would have been discussed somewhere in the Report. Instead, the report simply rubber-stamped the Defendants' affidavits which were submitted in bad faith.

What is not in dispute is that this Judgment is in conflict with the law.

What is not in dispute is that erroneous Judgments foster untruthfulness, withholding evidence, spoliation of evidence, abuse of *pro se* litigants, and an ultimate lack of disrespect of the people for the court.

What is in dispute is whether Defendant's counsel can substitute inaccurate statements and cherry-pick excerpts to be "rubber-stamped", even as the full, indelible, evidence sits in the court records.

What is in dispute is whether the Plaintiff shall be granted hope of relief in a court, consistent with the doctrine of equality

under the law. This is not an instance of a court merely interpreting a law one way over another, but of systematically disregarding two (2) previous Decisions, and law and then failing to properly apply the laws –including those which explicitly direct how patents must be used in Federal cases.

Supremacy of law suggests that the court take jurisdiction of the subject matter. Both accountability and the doctrine of equal protection under the law require that the original above-entitled complaint not be dismissed.

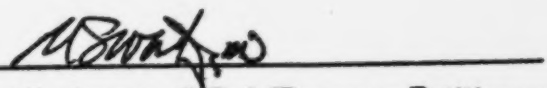
This court has final supervisory jurisdiction over the subject matter and should investigate and then consider correcting this situation. There may be inadequacies and a lack of normal attorney eloquence in this Brief, but the Appellant is not a lawyer, and is *pro se*, and requests said examination of said subject matter because this court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (1972)].

The petitioner respectfully requests reversal of Motion of Summary Judgment and a remand for those issues of material fact which remain to be tried, and where the Defendants are not entitled to a summary judgment in their favor as a matter of law.

The petitioner requests reversal of the denial of the Motion for a Default with respect to Mr. Kirn at Plough (A117).

Wherefore, Petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,



Mitchell R. Swartz, ScD, MD, *pro se*, Petitioner
P.O. Box 81135
Wellesley Hills, MA 02481-0001

IN THE

Supreme Court of the United States

Mitchell R. Swartz, Plaintiff,
Petitioner

v.

Schering-Plough Corporation, Plough U.S.A.,
Schering-Plough Healthcare Products,
Defendants,
Respondent

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

APPENDICES

APPENDIX A - JUDGMENT AFFIRMING DISTRICT COURT WITHOUT ANY SUBSTANTIVE COMMENT
02-1001

Issuing Court: US Court of Appeals for the First Circuit
Number of Case: 02-1001
Date of Denial: 9/24/02

United States Court Of Appeals For The First Circuit
No. 02-1001

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, and LIPEZ, Circuit Judge.

JUDGMENT

Entered: September 24, 2002

We have carefully reviewed the record n this case, including the briefs of the parties. We affirm the grant of summary judgment essentially for the reasons given by the magistrate judge in his report and recommendation, dated September 27, 2001.

AFFIRMED.

By the Court::
-s Richard Cushing Donovan
Clerk

Dated: September 24, 2002

APPENDIX B

Excerpt of Memorandum and Order
of Chief Judge William Young
[A202,A231; Swartz v. Schering-Plough Corp., 53F.Supp.2d95, 103 (1999)]

"The pleadings also give rise to reasonable inferences that Swartz turned over SUN-BUG information on the conditions that (i) the information would be kept confidential, and (ii) the Schering Defendants would proceed with good faith licensing negotiations at any time they chose to produce a dual-action sunscreen product."

"Finally, the Schering Defendants argue that the Amended Complaint expressly States that no agreement was ever reached between the parties. Once again, the Schering Defendants are mistaken. While it is true that the Amended Complaint states that plaintiff and Defendant at never reached an agreement regarding the said confidentially-transmitted and shared idea, business, plan, formula, design technology and trademark known as SUN-BUG, this allegation refers to the failure to come to terms on a licensing agreement – not a confidentiality agreement."

Memorandum and Order of J. Young, 1999; A202,A231;
Swartz v. Schering-Plough Corp., 53F.Supp.2d95, 103 (1999)

APPENDIX C

Excerpt of Decisions Involving the "Novelty" of an Invention

Definitions of "identical" or "new":

> **"... rejections under 35 USC 102 are proper only when the claimed subject matter is identically disclosed or described in "the prior art".**
> [*In re Arkely, Eardley and Long*; 172 U.S.P.Q.524,526(CCPA, 1972)]

In this case, the cited patent is NOT the same as SUN-BUG or BUG&SUN Therefore, the cited patent is not relevant and is relied upon improperly.

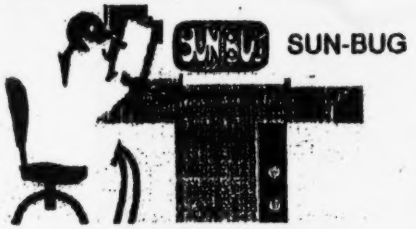
> **"It is wrong to use the patent in suit [here the breach of contract] as a guide through the maze of prior art references, combining the right references in the right way to achieve the result of the claims in suit [here the use of an irrelevant patent in the presumption that the a different invention and the cited patent might be the same]. Monday morning quarterbacking is quite improper when responding the question of nonobviousness in a court of law [here the Report]."**
> [. Orthopedic Equipment Co. Inc. v United States, 217 U.S.P.W. 193, 199 (CAPC 1983)]

In this case, the cited patent must be used for what it really states, and the cited patent leads away from SUN-BUG.

> **"This court has said that '(all of the disclosures in a reference must be evaluated for what they fairly teach (emphasis added) one of the ordinary skill in the art.'"**
> [Court of Custom and Patent Appeals [In re Langer and Haynes, 175 USPQ 169, 171 (CCPA 1972)]

APPENDIX D - The SUN-BUG to BUG&SUN Timeline
HOW PLOUGH TOOK "SUN-BUG" AND MADE IT INTO "BUG&SUN"

Dr. Swartz invents optimal performance dual protection SUN-BUG. Dr. Swartz, Elizabeth Solomon (now Marks), Dr. Robert Berlin and Katherine Berlin become business partners and start company using Dr. Swartz's SUN-BUG.

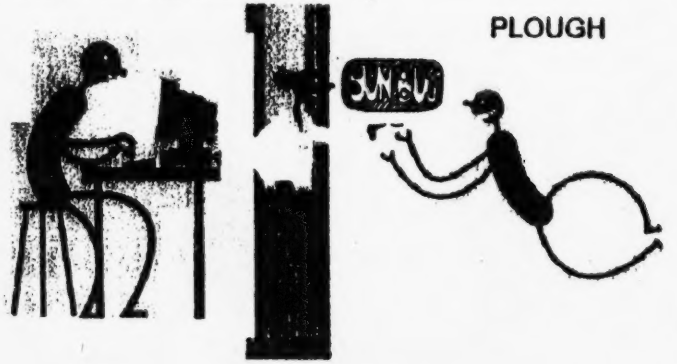


Three partners [Berlins and Solomon] are linked with very long-standing close family ties to both the CEO and Founder of Plough, Inc., Mr. Solmson and Mr. Plough respectively. Inquiry is made.

Mr. Solmson, with fiduciary responsibility to two of the four business partners, "pooh-poohs" the need for a formal written confidentiality agreement due to long-standing family trust and confidence involving both Berlins and Mr. Solmson (CEO) and Ms. Solomon and Mr. Plough (founder). Based on this, the SUN-BUG business partners trusted Plough to do the "right thing".

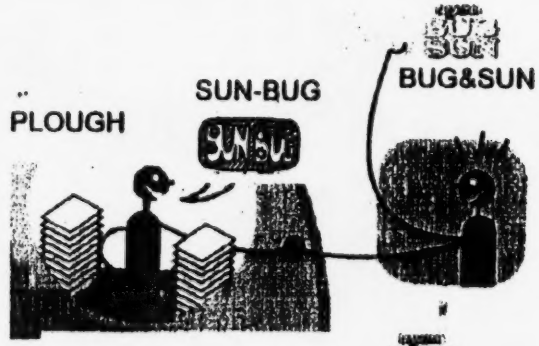
APPENDIX D - The SUN-BUG to BUG&SUN Timeline (Part 2)

Based upon the trust and confidence, Dr. Swartz prepares and sends information, package, product and materials to Plough. Additional information and other materials are sent by Dr. Berlin to Mr. Solmson.



The SUN-BUG information is received because Mr. Solmson shares the SUN-BUG idea with at least four individuals within Plough.

The SUN-BUG information is received because Mr. Solmson calls Dr. Berlin back.
Dr. Berlin is informed that SUN-BUG is ready for production but Plough will contact Dr. Berlin, Ms Berlin, Ms. Solomon and Dr. Swartz if they elect to make SUN-BUG.



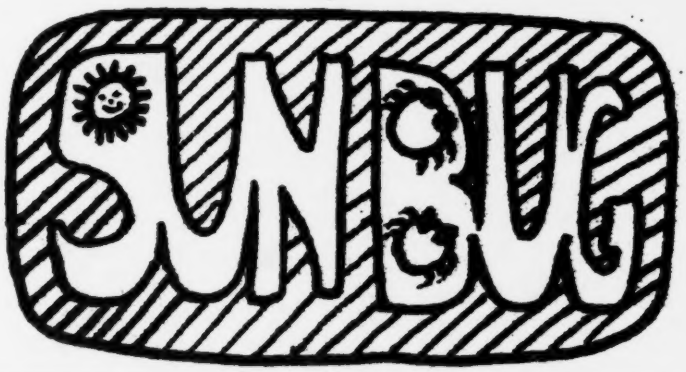
Mr. Solmson reveals in his deposition [1/2000] that there have been secret industry-wide agreements to "not keep records" of incoming ideas, but some of these materials manage to "reappear" at a later time. Plough holds onto the ideas which are shared for later use.

In this case, Plough systematically changes SUN-BUG to SUN&BUG, and then finally to BUG&SUN with other individuals.

BUG&SUN hits the market.
Plough breaks its agreement and reaps what it did not sow.

APPENDIX E -
Near Identical Logos and Names of SUN-BUG and BUG&SUN

SUN-BUG 1975



BUG&SUN 1999

Supreme Court, U.S.
FILED

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No.

IN THE

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On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

SUPPLEMENTAL APPENDIX

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February 7, 2003

29 pp

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** Located In (Previous) Appendix With Petition

**** The Notations herein are to the Appendix of this Petition (e.g., App. A) and those made to the US court of appeals, in the Appeal Brief (e.g., AB12 for page 12), Appellant's Appendix (A123) or Addendum (AD12).

APPENDIX F

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#169)

Issuing Court: US District Court, First Circuit
Number of Case: 99-10177-NG
Date of Issue: September 27, 2001

I. Introduction

On April 12, 1999, plaintiff Mitchell Schwartz (*sic*) (hereinafter "Schwartz") filed a ten-count amended complaint against defendants Schering-Plough Corporation, Plough U.S.A. and Schering-Plough Healthcare Products hereinafter collectively "Schering" or "the defendants". A ruling on the defendants' motion to dismiss in June of 1999 by the District Judge to whom the case was then assigned narrowed the scope of the litigation to a single claim for breach of contract. See Swartz v. Schering-Plough Corporation, 53 F.Supp.2d 95 (D. Mass., 1999).

The gist of Swartz's breach of contract claim is that in 1975 or 1976 documents relating to a combination sunscreen/ insect repellant (sic) topical skin care product he and others had invented were delivered to Schering pursuant to an oral confidentiality agreement. (#32 ¶26) The plaintiff contends that Schering subsequently breached the alleged confidentiality agreement when it manufactured, marketed and distributed the skin care product without first contacting Swartz and the other inventors. (#32 ¶26) With discovery now complete, Schering has filed Defendants' Motion For Summary Judgment (#169) seeking brevis disposition on the sole remaining count of the amended complaint. A memorandum of law in support (#170), a statement of undisputed facts (#171), and an affidavit of Julia Frost-Davies, Esquire, with attached documents (#172) accompanied the motion. Countering these submissions, Swartz has filed a response in opposition (#175), an affidavit of Robert Y. Berlin, Ph.D. (#176), and an affidavit of Mitchell Swartz, MD, ScD, as well as appended summaries (#177). With leave of court,

1. To be more precise, the appellation "Schering" or 'the defendants" as used herein applies only to Schering-Plough Corporation and Schering-Plough Healthcare Products, Inc. It is these two defendants that are moving for the entry of judgment as a matter of law.

Schering filed a reply brief (#180). The record is now complete and the summary judgment motion is in a posture for decision.2

II. The Facts

It is perhaps best to begin with an identification of the players. The so-called "S-B Group" referenced throughout plaintiffs paper's consists of Elizabeth Solomon Marks (hereinafter "Solomon"), Katharine (hereinafter "Ms. Berlin"), Robert Y. Berlin (hereinafter "Dr. Berlin") and Swartz. (#176 ¶2; #177 ¶2) Abe Plough was the founder of Plough, Inc., now was Schering-Plough Corporation.[3] (#176 ¶3) Harry Somson[4] (hereinafter "Somson") is a past-President and Chief Executive Officer of Schering-Plough Corporation. (#176 ¶3; #177 ¶2) Somson had a personal relationship with certain members of the S-B Group.[5] For example, he was a cousin of Ms. Berlin and a trustee of a trust of which she was a beneficiary. (#176 ¶4) It is consequent to this close relationship that the confidentiality agreement supposedly arose.

According to the allegations of the amended complaint,[6] in December of 1975 the technology, idea, business plan, formula, trademark, intellectual property, drawings for labels, logos and the container for a skin care product called SUN-BUG (collectively "Sun-Bug Documents") were delivered to Schering by members of the S-B Group pursuant to an oral confidentiality agreement. As determined in the earlier Memorandum and Order:

> **A favorable reading of the Amended Complaint allows this Court to ascertain the essential terms of the confidentiality agreement with reasonable certainty. For instance, the agreement was entered into "on or about December of 1975" by Dr. Berlin, Ms. Berlin,**

2. The motion for summary judgment has been referred to the undersigned for the issuance of a report and recommendation as to disposition pursuant to 28 U.S.C. 636(b).

3. Mr. Plough is deceased and was not involved in any aspect of this litigation.

4. Somson's name is spelled differently throughout the documents in the case file. For the sake of consistency, his name shall be spelled herein as it was in the earlier Memorandum and Order on the motion to dismiss. See Swartz, 53 F.Supp.2d at 99.

Solomon, Abraham Plough and Somson and was to "continue forward from that time." Am.Compl. at ¶7.

***

While it is true that the Amended Complaint states that "Plaintiff and Defendant never reached a [sic] agreement regarding the said confidentially-transmitted and shared idea, business, plan, formula, design technology and trademark known as SUN-BUG," this allegation refers to the failure to come to terms on a licensing agreement–not a confidentiality agreement. As described above, the terms of the confidentiality agreement are discernible.
***Swartz*, 53 F.Supp.2d at 102-3, 104.**

`Swartz specifically alleges that the Sun-Bug Documents were ". . .put in a folder marked 'confidential' and carried in hand by Ms. Solomon [Marks], Ms. Berlin and their family and delivered to [Schering] in Memphis Tennessee in December 1975 with additional information in the following months. (#32 ¶8) At his deposition Swartz testified that he "personally delivered it [the Sun-Bug Documents], handed it

5. Dr. Berlin claims he had "a long-standing and close relationship with Messrs. Plough and Solmson". (#176 ¶5) Somson, on the other hand, testified that he had briefly met Dr. Berlin "maybe three or four times" at social functions in the 1970's, and last saw him in 1975. (#172, Exh. E at 17-9)

6. Although understanding that this is a motion for summary judgment, resort is taken to the amended complaint and the Memorandum and Order on the motion to dismiss for context not provided by the parties' submissions. While the plaintiff has submitted an affidavit (#177) allegedly providing, *inter alia*, background information, it consists almost entirely of unauthenticated quotes from depositions and argument, all of which is inadmissible as evidence and, therefore, disregarded. *See* Fed. R. civ. 56(e).

7. There was some suggestion by Swartz that Solomon may have delivered the package to Schering indirectly via an intermediary, her mother, Sara Grace Holcomb. (#1.72, Exh. D at 126-8) Ms. Holcomb has submitted an affidavit wherein she denies ever having any communications with Abe Plough, Somson or anyone else at Schering about sun-Bug or any other "combination insect-repellent and sunscreen. (Defendants' Statement #171, Exh. 3 ¶¶3,4) Ms. Holcomb also specifically avers that she never delivered any documents or like materials to Abe Plough, Somson or anyone else at Schering about sun-Bug or any other "combination insect-repellent and sunscreen." (#171, Exh. 3 ¶¶5,6)

to Elizabeth Solomon [Marks], who was taking it [to Schering] (#172, Exh. D at 124) The plaintiff further stated that he "ha[d] absolute trust and confidence that Elizabeth Solomon Marks... did deliver the package labeled confidential and that it did go to [Schering]. (#172, Exh. D at 128~) Again quoting from the Memorandum and Order on the motion to dismiss:

> **The pleadings also give rise to reasonable inferences that Swartz turned over SUN-BUG information on the conditions that (i) the information would be kept confidential, and (ii) the Schering Defendants would proceed with good faith licensing negotiations at any time they chose to produce a dual-action sunscreen product. *See id.* at ¶¶8-10. While more details would certainly be helpful, those provided are sufficient to survive a motion to dismiss.**
>
> *Swartz*, 53 F.Supp.2d at 102-3, 104.

As earlier noted, the confidentiality agreement was allegedly breached in the 1990's when the defendants began to manufacture and market a combination sunscreen/insect repellant skin care product without first contacting the plaintiff.

III. The Summary Judgment Standard

When considering whether to grant summary judgment, the Court must determine whether:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
>
> Fed. R. Civ. P. 56(c).

In making this assessment, the Court will indulge all reasonable inferences in the light most hospitable to the party opposing summary judgment, but will ignore "conclusory allegations, improbable inferences, and unsupported speculation." *Suarez v. Pueblo International, Inc.*, 229 F.3d 49, 53 (1 Cir., 2000) quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5,8 (1 Cir., 1990).

A party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact thereby entitling the party to judgment as a matter of law. *Carmona v. Toledo*, 215 F.3d 124, 132 (1 Cir., 2000).

> 'Not every factual dispute is sufficient to thwart summary judgment; the contested fact must be "material" and the dispute over it must be "genuine." In this regard, "material" means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, "genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party....

Grant's Dairy–Maine, LLC v. Commissioner of Mciine Dept. of Agriculture, Food & Rural Resources, 232 F.3d 8, 14 (1 Cir., 2000) quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1 Cir., 1995) (citations and some internal quotation marks omitted).

A factual dispute which is neither "genuine" nor "material" will not survive a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Rule 56 does not permit the party opposed to the summary judgment motion to rest upon the mere allegations or denials in its own pleadings. *See International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Center*, 103 F.3d 196,205 (1 Cir., 1996) (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1 Cir., 1992), *cert. denied*, 507 U.S. 1030 (1993)("The core purpose of the summary judgment procedure is to 'pierce the boilerplate of the pleadings' and evaluate the proof to determine whether a trial will serve any useful purpose."). Rather, Rule 56(c):

> mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. Discussion

A. Is There Evidence That A Contract Was Formed?

The defendants' position is straightforward: the plaintiff has proffered no evidence to support the allegations of his complaint. Specifically, it is argued that Swartz cannot prove that a valid, enforceable contract existed between the parties. According to Schering, the testimony of the S-B Group was uniform: each member of the group denied having delivered confidential documents to the defendants.[8] At her deposition Ms. Solomon testified as follows:

> Q. What discussion did you have with respect to contacting Schering-Plough?
> A. Again, I am not going to tell you I recall details, but conceptually I recall discussing we knew the folks at Schering-Plough because of a personal relationship. Abe we talked about, and we talked about Harry Solmson, certainly. He was a member of the family (phonetic), so he was someone I remember we talked about taking the idea to, and certainly going to the R and D department with it.
> Q. Did you, in fact, have any contact with Mr. Solmson about this product?
> A. I did not.
> Q. Have you ever had any talks with Mr. Solmson about this product?
> A. No.
> Q. Have you ever had any contact with anyone else at Schering-Plough about this product?
> A. No.
> Q. Have you ever delivered any documents to anyone at Schering-Plough concerning this product?
> A. I personally, no.
> Q. As you sit here today, can you name any individual who delivered documents regarding this product to Schering-Plough?
> A. No.

8. Swartz does not contend either that he delivered anything to Schering or that he had any conversations with any Schering representatives.

Q. ...To this day, have you had any communications with anyone at Schering-Plough in connection with this product?
A. No.
Affidavit #172, Exh. A at 26-8.9

When questioned at her deposition, Ms. Berlin stated:
Q. Okay. What was said by you and by Dr. Swartz with respect to the product being sent to ScheringPlough?
A. Mitchell told me that he put the information in an envelope marked "confidential" that was sent to Schering-Plough and did I remember that.
Q. And what did you say?
A. Nope, but I don't doubt it.
Q. Did you at any time see an envelope such as you have just described?
A. Nope.
Q. Do you have any memory of anytime yourself putting documents into such an envelope and marking them as you described?
A. No.
Q. I'll reask it. Other than the conversation that you've just described with Dr. Swartz, have you been told by anyone else that there were materials placed in an envelope marked "confidential" and delivered to Schering-Plough?
A. Have I been told that there were - that these documents were placed in an envelope and sent to Schering-Plough?
Q. Yes.
A. No.
Q. What was said during the context of your conversation with Dr. Swartz with respect to Schering's response?
A. I shared with him my memory of Schering's response.
Q. What was that memory?

9. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Ms. Elizabeth Solomon Marks, As Sun-Bug Business Group Member, On 5/10/00", which both quotes and characterizes portions of Solomon's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. P. 56(e).

A. That Robert Berlin received a phone call from someone at Schering who told him that they were not interested in the product at. that time.

Q. How did you come to learn of this phone call?

A. Robert Berlin told me.

Q. As you sit here today, can you tell me of any other knowledge you personally have of Schering's response to Dr. Swartz's allegation that these materials were delivered to Schering-Plough?

A. I only know of the phone call.

Q. Do you have any memory of anything being sent to someone in R&D?

A. I don't know whether it was sent to someone in R&D, whether it was sent to someone else. I do not know who it was sent to in Schering-Plough. I am assuming-but I do not have any specific memory, and I do not recall whether I knew at the time or not-that something was actually sent to Schering-Plough because Robert Berlin told me of this telephone response that Schering-Plough was not interested at that time. So I am assuming Schering-Plough had something to respond to.

Q. Okay.

A. What it was and how it got there and who it went to, I do not know.

Q. And you don't know, in fact, whether it was an oral communication, a written communication, or what form of communication may have occurred; is that correct?

A. I don't know from my personal knowledge. I believe Mitchell swears that he put something in an envelope, but I do not know from my personal knowledge.

Affidavit #172, Exh. B at 25-8, 51~2. 10

The testimony of Solomon and Ms. Berlin is crystal clear and unequivocal. Swartz' statements and allegations notwithstanding, neither of these members of the S-B group delivered Sun-Bug Documents and information to Schering,

10. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Katharine Myar Berlin, As Sun-Bug Business Group Member, On 5/3/00", which both quotes and characterizes portions of Ms. Berlin's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. P. 56(e).

nor did they have any discussions about Sun-Bug with any representative of Schering. With this state of the evidence, Dr. Berlin remains the only possible member of the S-B Group who could have entered into a confidentiality agreement with, and delivered documents to, Schering.

First, Somson's recollection of his interaction with Dr. Berlin shall be recounted:

Q. You mentioned that you have seen or spoken with Dr. Berlin several times. Three of four times was your testimony.

A. Yeah.

Q. What was the nature of those meetings or conversations?

A. Oh, it was just social. And then in 1975, I recall Miss Myar had this open house and there were quite a few people coming and going, and my wife and I went. And at that time Dr. Berlin mentioned to me that he had a formula for a suntan product with an insect repellent embodied in it, and asked me if we would be interested in a royalty agreement. I told him I didn't think so but that I would check and let him know.

Q. So you told Dr. Berlin that you didn't think that Plough would be interested but that you'd check for him?

A. I told him at the time that I didn't think so. And then I went I guess as a matter of courtesy, I went back the next day and I talked to a guy named Alfred J. Hughes, we called him Jay Hughes. And Jay was really our top sales man, and he was in charge of a group of people that sold to these chains [discount, drug and grocery chains]. We sold to other people, but they were our main source of income. And Jay didn't feel like he could create enough demand on the product to get his customers to stock it.

And I may have talked to a guy named Frank Craig. I am not sure. Frank, when we bought Coppertone, we moved the business to Memphis and did the manufacturing there and used the Coppertone building, they had a small building in Miami, as a warehouse distribution point for our whole product line. Frank joined our sales organization. And I may have talked to him about it, I'm not sure.

Q. And what was the substance of your conversation with Mr. Hughes about this formula that you're referring to?
A. It was very brief.
Q. Could you describe it?
A. Just as I indicated, he didn't think it was worth fooling with. And I called Bob and told him that we weren't interested.
Q. And do you remember what Dr. Berlin said when you told him you weren't interested, if anything?
A. No.
Q. And that was the end of your contact with Dr. Berlin as far as you remember?
A. Yes, it was.
Q. You mentioned earlier that Dr. Berlin told you that he had a formula for a combination sunscreen/insect repellent; is that correct?
A. That's correct.
Q. How long was your conversation with Dr. Berlin?
A. Very brief. Maybe five minutes.
Q. And can you just summarize, again, what Dr. Berlin said to you regarding this?
A. He said he had a formula for a suntan product combined with this antibug thing. And I was under the impression, really, that it was his, knowing he was a doctor. He didn't say that it was any-it was his, he didn't say that, but that was the impression I got.
Q. Was anyone else involved in this discussion between you and Dr. Berlin?
A. No. No. I probably mentioned it to Mr. Plough the next day. But he really wasn't active in the day-today business, and he really had no reaction to it. I'm not sure I mentioned it to him, but I probably did.
Q. You testified that you went to check with Mr. Hughes?
A. Yeah.

Q. Is that correct? And Mr. Hughes told you that the company was not interested in the combination insect repellent/sunscreen; is that correct?

A. Well, he told me he didn't think it would sell enough to justify fooling with it.

Q. And how long was your discussion with Mr.

Hughes about the combination product?

A. Very brief.

Q. Five minutes or less?

A. Not any more....

Q. After talking with Mr. Hughes, you then talked to Dr. Berlin again about this combination sunscreen?

A. I called him on the phone.

Q.. And what did you tell him, if you remember?

A. I told him-I thanked him and told him we weren't interested.

Affidavit #172, Exh. E at 19-21, 29-31."

Somson denied every having received any documents, product samples or technology about Sun-Bug or any comparable sunscreen/insect repellent combination product from Dr. Berlin or anyone else. (#172, Exh. E at 31-2) He further testified he never referred Dr. Berlin to anyone at Schering to call about the proposed product. (#172, Exh. E at 34-5) Lastly, Somson asserts that he never came to any agreement whatsoever with any member of the S-B Group regarding Sun-Bug or any comparable sunscreen/insect repellent combination product. (#172, Exh. E at 36)

11. Appended to Swartz's Affidavit (#177) is a document entitled "summary Of Admissions Made At The Deposition Of Mr. Harry B. Solmson, As President (Ret.) Of Plough, On 1/13/00", which both quotes and characterizes portions of Somson's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. civ. p• 56(e).

Excerpts from Dr. Berlin's deposition taken on November 29, 1999, include these exchanges:

Q. Is it contemplated by this business plan that you will get together materials and packaging and provide samples eventually to Plough?

A. Correct.

Q. Now, do you know whether or not samples were provided to Plough?

A. Yes, I do.

Q. They were?

A. Yes, they were.

Q. And who provided them?

A. They were provided by Elizabeth Solomon, one package, and I believe a general package was done, you know, in order to get the product to Plough.

Q. You are unable to identify the handwriting as not being yours?

A. It's a long time ago. I don't know if I wrote that. That could be Mitchell's, it could be sent out subsequent to that, as well.

Q. To whom?

A. Well, the first one was stewarded through the family confidentially and was stewarded through Mr. Solmson, Sarah Grace Solomon, Kay Myar, Katharine Myar. I believe Elizabeth sent that through family channels. The other one was sent to a name which we cannot remember, as a follow-up to insure that there was at least two packages.

Q. . . .Who sent the second sample?

A. My recollection is very vague on that, but I know that since I was in charge of distribution, that there's some possibility that was something that Kathy and I did. But I don't have a strong recollection about that one. But I do know that there was some stuff sent out.

Q. How was the first sample delivered, then, in the first case, first sample?

A. I believe Doctor Swartz gave Elizabeth Solomon a full packet with every page and the outside of the package marked Confidential with the understanding that this material was going through family channels to the product development team for review and that this was something that we asked Mr. Solmson about because Abe at that time was essentially retired, even though he was going in, and it would have been inappropriate to really bother him about it.

Q. By Abe you mean -

A. Abe Plough, yeah. So at that point Harry B. was not ascendant in the company. He was more part of the company. I do not believe he was the chief executive officer at that time, but he was plugged into the company and the family, and the family is, they're all mixed, Plough, Solmson, Myar, Solomon and Hahn, they're all mixed. And this is the information that was passed through on a number of sources as to whom it should be sent to and the packet went out.

Q. And you don't know to whom it was sent?

A. It was sent to Plough, you know, via, you know, Elizabeth Solomon to the product development manager. There was a name given, but it's so many years ago, I can't come up with that one.

Q. And then you said you had some role in the second sample?

A. For some reason there was a need to send it to a second location or another location or another person or something. We sent out another packet.

Q. Do you know where it was sent?

A. No, I don't know where it was sent. I don't remember.

Q. And approximately when was this done?

A. I would say the first packets went out sometime in January of '76 and I think the follow-up went out sometime in the beginning of February.

Q. Now, you said that you had a telephone conversation with in (sic) connection with these samples?
A. Well, I had a conversation with, it was a two-tiered lab at the time, to the best of my recollection, and I spoke with the fellow who sort of takes in ideas. I don't know what you'd call him, but it was two-tiered. It wasn't the director, but it was whoever submissions were made to. He then and I had some phone conversations with him about, you know, how do we get it to you...
Q. Going back to your telephone conference, when did it take place?
A. That was sort of at the beginning, sort of just after Christmas and the beginning of January.
Q. And with whom did you talk?
A. I don't remember the person's name.
Q. Do you remember what position he had or she held?
A. I think I just said to you all I remember is a two-tiered system. One was involved in taking in and one was involved in reviewing and reporting I spoke with this gentleman and then followed up to the same gentleman.
Q. Which tier was he in?
A. I don't know...
Q. Now, did there come a time when you were given the name of someone to contact [at Schering]?
A. I was given a name?
Q. Yes. Were you?
A. Later.
Q. When was that?
A. I don't know.
Q. What did you do?
A. What did I do? I think I had to send a second sort of supporting something to someplace I said, I don't remember too well.
Q. What had you done before you had to send a second-
A. I was out of the loop.
Q. You were out of the loop?
A. Uh-huh.

Q. Would you explain what you mean?
A. It was incumbent for Elizabeth to take over at that point.
Q. Elizabeth Solomon?
A. Yeah.
Q. or of (sic) the materials to Plough?
And you had no further contact with the routing
A. Except what I mentioned previously.
Q. The two telephone conversations the telephone conversations?
A. (Witness nods head).
Q. Is it your understanding that Elizabeth Solomon actually physically delivered the package containing the sample and formula to someone at Schering-Plough?
A. That's my recollection that she was involved in that part of this, yes.
Q. That is the active delivering the package to somebody at Schering-Plough?
A. Yes, yes.
Q. Who delivered the other package?
A. That was mailed.
Affidavit #172, Exh. C at 70-7, 129-30, 137.[12]

In opposition to the defendants' motion for summary judgment, on or about October 31, 2000, Dr. Berlin filed an affidavit. (#176) Like the deposition testimony, Dr. Berlin's affidavit shall be quoted at some length:

7. I spoke with Mr. Solmson in early December, 1975 and started communications covering a collaboration whereby Plough would manufacture and market our [the S-B Group's] SUN-BUG product.

12. Appended to Swartz's Mfidavit (#177) is a document entitled "Summary Of Admissions Made At The Deposition Of Dr. Robert Y. Berlin, As 5i.in-Bug Business Group Member, On 11/29/99", which both quotes and characterizes portions of Dr. Berlin's deposition testimony. This document is inadmissible and, consequently, cannot be considered in deciding the dispositive motion. *See* Fed. R. Civ. p. 56(e).

8. Mr. Solmson referred me to a number of officers and/or employees of Plough such as his assistant and a liaison person and through them to Plough's manager for new product ideas/development who I communicated with (sic).

9. This man told me the information that he needed, including where to send our package of product information.

10. I spoke with Mr. Solmson about whether we should enter into a written confidentially (sic) agreement and he said that it would not be necessary as he would protect us and I told this to members of the S-B Group.

11. Thereafter, I had written correspondence and technology transfer communications with Plough which included the detailed formula, actual product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation.

12. The S-B Group shared information regarding different concentrations and duration of effectiveness for difference (sic) amounts. There are several packaging descriptions, several bases and even suggested fragrances, as well as arguments for and against camphor and some other things.

13. I spoke with Dr. Swartz, who had sent a similar package delivered through Ms. Elizabeth Solomon, who had told me of this and I also, on my own, mailed a second backup package on or about January, 1976 to the manager of new product ideas/development and, by early February, 1976, I had further communications with Plough.

14. Later, in February, 1976, I followed up on this with that man from Plough and kept the S-B Group advised.

15. By the middle of February, 1976, I called and inquired of Plough's manager for new product ideas/development to obtain status reports for our SUN-BUG product and have a vivid memory of my first conversation with him in early February, 1996, where he specifically acknowledged receipt of both packages and the materials from the S-B Group and he requested that I call him in another month so that he could keep me appraised (sic).

16. In March, 1976, I had a conversation with this Plough manager which I recall lasting approximately twenty (20) minutes. We also discussed licensing or royalty fees that Plough would pay to the S-B Group if Plough were to take on, manufacture and market our product and he gave me an approximate range of from 5 to 7%, which he said was the standard range for Plough to pay and I agreed to this.
17. I probably had three (3) conversations with said manager until around the middle of April, 1996, when he told me that Plough was in the process of change and moving away from sun care products. He told me that if Plough should ever move back in that direction, Plough would contact me and that the S-B Group would be part of the project.

Affidavit Of Robert Y. Berlin, Ph.D., #176 ¶¶7-17.

A legal issue is raised by the filing of Dr. Berlin's affidavit, to wit, what weight should be afforded an affidavit submitted subsequent to the filing of a dispositive motion that directly contradicts earlier testimony and does not adequately explain the reason for such conflict? *See Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1 Cir., 1994); *see also, Torres v. E.I.* Dupont *De Nemours & Company*, 219 F.3d 13, 20-1 (1 Cir., 2000).[13] In *Colantuoni* an employee of a general contractor brought a negligence and strict liability suit against his employer and a ladder manufacturer after a slip-and-fall accident. *Colantuoni*, 44 F.3d at 2. Following the submission of the defendant's motion for the entry of judgment as a matter of law, the plaintiff filed an affidavit containing sworn statements that directly contradicted his earlier testimony. *Colantuoni*, 44 F.3d at 2. The Court disregarded the affidavit in its summary judgment analysis because the affiant failed sufficiently to explain the direct contradiction[14] *Colantuoni*, 44 F.3d at 5. Of particular note, it was found that (i) the affidavit was submitted only after the motion for summary judgment was filed and (ii) the explanation given for the inconsistency in the evidence proffered therein was not viable. *Colantuoni*, 44 F.3d at 4-5. [15] The Court held that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a

satisfactory explanation of why the testimony is changed. *Colantuoni*, 44 F.3d at 4-5.

Relying on the *Colantuoni* rationale, the *Torres* Court wrote as follows:

> Appellants' contention that they lacked the requisite knowledge of who caused their injury prior to 1992 is contradicted by the deposition testimony of Miguel A. Colon-Capeles, which indicates that by December 20, 1989 appellants were preparing a claim against DuPont. As outlined above, Colon-Capeles testified that Armando Torres requested "a certification" of the papayas he had purchased from appellants in 1986, 1987, and 1988 "because they had a claim against the DuPont company concerning a chemical which had apparently affected the sowing and the farms and the lands in which they had their 'papaya' farms." In response to a follow—up question, Colon-Capeles reiterated that Armando Torres "requested that he needed a certification what he had sold to me during the year so as to be able to support his case.
>
> After DuPont moved for summary judgment, appellants attempted to rebut Colon- Capeles's deposition

13. Such contradictory affidavits are to be contrasted with merely self-serving ones:
However, a "party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." *Cadle Co. v. Hayes*, 116 F.3d 957,961 n. 5 (1st Cir.1997), *citing Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 706 (1st cir.1993). Santiago-Ramos' affidavit contains more than the allegations made in her complaint: it provides specific factual information based upon her personal knowledge. It may be self-serving, but it complies with the requirements of the federal rules, and we therefore must consider it together with the other evidence before the magistrate judge.
Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1 Cir., 2000).

14. In his deposition the plaintiff testified that he realized the ladder might slip, but in his later affidavit stated that at all times he used the ladder he believed it to be safe and had no knowledge that it would slip. *See Colantuoni*, 44 F.3d at 5.

15. The only explanation for the conflicting evidence was that the affidavit described the plaintiffs state of mind at the time of the accident and the deposition described plaintiffs state of mind at the deposition. *See Colantuoni*, 44 F.3d at 5.

testimony by filing an affidavit from him dated July 10, 1998. In that affidavit, Colon-Capeles states "[a]fter careful reflection, I am unable to recall the reason for which Mr. Torres requested that I provide him with invoices" in 1989. Appellants also filed an affidavit from Armando Torres dated July 8, 1998, stating that he had requested the invoices in order to submit a claim for federal assistance ("FEMA") relating to Hurricane Hugo.

The district court struck both affidavits on the basis that appellants "failed to justify the suggested changes in testimony and have likewise failed to create a genuine issue of credibility."

It is settled that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir.1994); *see also Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir.1993); *Trans-Orient Marine v. Star Trading & Marine*, 925 F.2d 566, 572 (2d Cir.1991); *Davidson & Jones Dev. v. Elmore Dev.*, 921 F.2d 1343, 1352 (6th Cir.1991).

Here, as in *Colantuoni*, appellants offered the affidavits of Miguel Colon- Capeles and Armando Torres "only after defendants had filed motions for summary judgment." 44 F.3d at 5. Notably, the post-summary judgment affidavit of Colon-Capeles does not indicate that there was any confusion at the time of his deposition testimony, *see, e.g., Colantuoni*, 44 F.3d at 5, nor does it allege that the prior testimony was in error. In fact, Colon-Capeles's affidavit makes no reference to the contrary statements in his deposition at all. As the district court indicated, there is simply nothing in the record that provides any explanation for why Colon-Capeles changed his testimony. *See Torres II*, slip op. at 10.

Armando Torres's July 8, 1998 affidavit fares no better. It states:

On or about December 20, 1989, I asked Miguel Colon [Capeles] of Cheche Tropical Products to provide me with certifications of the amount of papaya that he purchased from Agro Industrias from 1986 to 1988 in order to submit a claim for federal assistance ("FEMA") relating to Hurricane Hugo. I did not ask Mr. Colon

[Capeles] to prepare the certification for a claim against DuPont since I did not become aware, until the summer of 1992, that my use of Benlate 50 DF was responsible for the loss of my papaya plantations.

However, at his January 23, 1998 deposition, Armando Torres testified that he either never made a claim to the Federal Emergency Management Agency ("FEMA") or, at the very least, he did not recall whether he had made a claim to FEMA. In addition, appellants' responses to DuPont's interrogatories contain admissions that flatly contradict Armando Torres's July 8, 1998 affidavit. First, appellants stated that Hurricane Hugo damaged plantains. The certifications prepared by Colon-Capeles refer to papaya, not plantains. Second, appellants stated that as of 1989, the year Hurricane Hugo struck Puerto Rico, they were no longer planting papaya. Again, Armando Torres's affidavit provides no explanation for these contradictions.

Torres, 219 F.3d at 20-1.

In other cases, courts have excluded later-filed affidavits that purport to offer detailed recollections of events which, at the time of the earlier depositions, the deponent/affiant had no memory. See, e.g., Unterretner v. Volkswagen of America, Inc., 8 F.3d 1206, 1210 (7 Cir., 1993) "A party cannot claim a lack of general knowledge about a subject and later make a statement that requires detailed knowledge about the same subject."; Clark v. Takata Corporation, 192 F.3d 750, 759-61 (7 Cir., 19995; Acuff v. IBP, Inc., 77 F.Supp.2d 914, 927-8 (C.D.Ill., 1999)

16. Other notable contradictions exist. For instance, in his affidavit Dr. Berlin attests that "[w]e [Dr. Berlin and Schering's manager for new product idesas/development] also discussed licensing and royalty fees that [Schering] would pay to the 5-B Group if [Schering] were to take on, manufacture and market our product and he gave me an approximately [sic] range of from 5 to 7%, which he said was the standard range for [Schering] to pay and I *agreed* to *this*. (emphasis added) (#176 '116) Not only is the fact of this alleged agreement in direct conflict with Dr. Berlin's earlier testimony, but it also conflicts with the allegations in the Amended complaint and the findings of the court at the motion to dismiss stage.

Dr. Berlin's precise, detailed testimony in his affidavit contradicts his ambiguous, amorphous deposition testimony. For example, at his deposition Dr. Berlin had a "very vague" memory as to who allegedly sent the second package to Schering and that there was "some possibility" that he had done it. He also could not remember where that second package was purportedly sent. His testimony was that he thought that he "had to send a second sort of supporting something to someplace else", but that he did not "remember too well."

By contrast in his affidavit Dr. Berlin states unequivocally that he himself sent out the second package to "the manager of new product ideas/development" at Schering who thereafter "specifically acknowledged receipt of both packages and the materials from the S-B Group." Moreover, the second package was described as "includ[ing] the detailed written formula, actual product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation."[6]

No explanation whatsoever has been forthcoming to explain the striking differences in Dr. Berlin's recollections. In these circumstances, Dr. Berlin's affidavit must be stricken as it was clearly filed in order to raise genuine issues of material fact so as to avoid the entry of judgment as a matter of law.

Based upon the record now before the Court, the plaintiff has failed to produce any admissible evidence to show either that he or the S-B Group entered into a confidentiality agreement with Schering or that any Sun-Bug Documents were transferred to Schering pursuant to such a confidentiality agreement. In the absence of any genuine issues of material fact, the defendants are entitled to the entry of summary judgment in their favor on the plaintiffs breach of contract claim.

B. Is There Evidence That A Contract, If Formed, Was Breached?

Alternatively, even if Dr. Berlin's affidavit were to be considered and genuine issues of material fact were found respecting the existence of a confidentiality agreement and whether Sun-Bug Documents were given to Schering pursuant to it, the plaintiffs claim must yet fail given the utter

dearth of evidence produced to establish a breach. It is to be recalled that the alleged confidentiality agreement purportedly had as its terms that (1) whatever information was given to Schering "...would be kept confidential" and that Schering "...would proceed with good faith licensing negotiations at any time they chose to produce a dual action sunscreen product." *Swartz*, 53 F. Supp. 2d. at 103. First, there is no evidence that Schering did not keep whatever information was given to it "confidential." Second, there is no evidence whatsoever that Schering ever used any information given to it. If it never used any of the information, there would have been no need to enter any negotiations for a license. Despite Dr. Berlin's statements that the second package that he allegedly caused to be delivered to Schering "included the detailed formula, actual product samples of Our SUN-BUG sample packets and the appropriate packaging for our presentation" together with "different concentrations and duration of effectiveness for difference (sic) amounts" and "several packaging descriptions, several bases and even suggested fragrances, as well as arguments for and against camphor or some other things", the plaintiff has proffered no evidence to show that whatever was transferred was in fact used in any way by the defendants.

To establish a breach, Swartz would have to prove more than that Schering produced a combination suncreen-bug repellent. When the S-B Group allegedly transferred the Sun-Bug Documents to Schering in the mid-1970s, the invention or idea of a dual sunscreen/insect repellent skin product was not novel. Schering has submitted the copy a patent for just such a product which dates back to the 1940s. (#171 ¶11; #172, Exh. G) Indeed, in answers to interrogatories the defendants have identified numerous publications and patents, including one filed by Schering in 1971, all of which reference the idea of a combination sunscreen/insect repellent product either prior to the mid-1970s or before Schering's product was introduced in 1996. (#171 ¶11; #172, Exh. F, H, I) Several of the defendants' competitors had introduced similar sunscreen/insect repellent skin products to the market before Schering did. (#171 ¶11; #172, Exh. J, K, L, M, N) Finally, the formula for the defendants' product is licensed, in part, from a third party. (#171 ¶11; #172, Exh. 0)

In these circumstances, to succeed, Swartz has to submit evidence to demonstrate, or from which it can be inferred, that Schering utilized any information in the Sun-Bug Documents in their product. The absence of evidence that Schering did not keep whatever was transferred "confidential" or that Schering used or incorporated any of the information contained in the Sun-Bug Documents in the Schering product is fatal to the claim of breach.

No such evidence has been proferred (sic). Further, in light of the evidence showing that the idea for a combination sunscreen/insect repellent skin care product was not new either at the time the Sun-Bug Documents were purportedly transferred to the defendants or at the time that Schering's product was introduced to the market in the 1990s, and the fact that the defendants' product formulation is licensed, at least in part, from a third party, it cannot reasonably be inferred that the Sun-Bug Documents were utilized by Schering.

The plaintiff has not proffered evidence sufficient to raise a genuine issue of material fact as to whether the defendants breached the confidentiality agreement and, consequently, summary judgment should enter for Schering on the breach of contract claim.

V. Recommendation

For the reasons stated, I RECOMMEND that the Defendants' Motion For Summary Judgment (#169) be ALLOWED.

VII (sic). Review by the District Judge

The parties are hereby advised that pursuant to Rule 72, Fed. R. Civ. P., any party who objects to these proposed findings and recommendations must file a specific written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation.

The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections.

The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review.

See Keatingo. Secretary of Health and Human Services, 848 F.2d 271 (1 Cir., 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1 Cir., 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1 Cir., 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1 Cir., 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1 Cir., 1980); *see also Thomas v. Am*, 474 U.S. 140 (1985).

-s ROBERT B. COLLINGS
Chief U.S. Magistrate Judge
September 27, 2001

APPENDIX G - PLAINTIFF'S OBJECTION TO THE REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#169)

Issuing Court: US District Court, First Circuit
Number of Case: 99-10177-NG
Date of Issue: October 9, 2001

Pursuant to F.R.C.P. No. 72, the plaintiff, Mitchell Swartz, herewith objects to the report and recommendation of Magistrate Judge Collings on the defendants' motion for summary judgment (#169).

Procedure

The plaintiff is unaware of any record to be transcribed because he was not advised that Magistrate Judge Collings was considering the matter and neither him nor his attorney was advised of any oral argument.

The Report and Recommendation, which is dated September 27, 2001, was mailed to the plaintiff's attorney on September 28, 2001 (without any cover letter) and received on Monday, October 1, 2001. Accordingly, this objection has been timely filed.

Objections

1. On August 14, 2001, Magistrate Judge Collings' office, by Trish, requested that a copy of the plaintiff' s opposition to the defendants' motion for summary judgment be mailed to him and this was done on August 14, 2001. A copy of the cover letter is annexed hereto and specifically states "my client Dr. Swartz wants this motion to be heard only by Judge Gertner." (Emphasis added for emphasis.) After August 14, 2001 and until October 1, 2001, when plaintiff's course received the Report and Recommendation, no communications of any sort whatsoever took place between the Magistrate Judge's office and the attorney for the plaintiff.

2. On or about November 16, 2000, the plaintiff's counsel received the defendants' motion for leave to file a reply memorandum (brief) in support of the motion for summary judgment but plaintiff's counsel has never received any notice that said motion was allowed.

3. The plaintiff believes, and based on this belief, his attorney states that Magistrate Judge Collings was not impartial in his handling of this matter but, rather, that he made a series of orders against Dr. Swartz, who was pro se until he opted to retain counsel at the time of his deposition, on or about August 22, 2000. Specifically with regard to Magistrate Judge Collings' Report and Recommendation that he was arbitrary and capricious. A critical legal issue, as stated by Magistrate Judge Collings in his report at page 16, is what weight should be afforded to Dr. Berlin's Affidavit and it is submitted that based on his bias and prejudice, he submitted no weight to the same which was both unfair and inequitable.

4. That the Affidavit of Dr. Robert Y. Berlin Ph.D., is really not at odds with his Affidavit, however, his Affidavit is much clearer on some points where his memory was not clear because he had the advantage of discussing these matters with Dr. Swartz which refreshed his memory after his deposition had been taken.

5. The plaintiff had others who have testified that they recall communications which resulted In documents, notes, formulations as well as a sample of the Sun-Bug product being turned Over to Plough, Inc. and if the defendants were to use the product, then a license agreement was to be worked out. The defendants used the product and merely cut out the plaintiff, which is a clear breach of contract.

6. Magistrate Judge Collings accepted the facts as stated in portions of depositions transcripts (taken out of context and cherry picked) but he refused to accept Dr. Swartz's Affidavit which contained accurate references to specific deposition testimony. It is submitted that if Magistrate Judge Collings required copies of the actual deposition pages, he should have requested Dr. Swartz to produce the same.

LAW

The court should consider equitable principles and fundamental fairness.

This is a simple contract case where a contractual formula for a product (Sun-Bug) was turned over to Plough, Inc.. and it was to be kept confidential until and unless the defendants decided to use the same and in that event, a license agreement would be entered into. For the anti-insect component, the defendants used the exact formulation that was supplied by the plaintiff and his Sun-Bug Group to produce "Bug&Sun" (see annexed Affidavit of Mitchell Swartz of 10/9/01).

The plaintiff requests leave to have his annexed Affidavit considered as part of the record and that oral argument be permitted on this motion.

Additionally' the plaintiff requests leave to delay the court's consideration on the defendants' motion for summary judgment for thirty (30) days until he can file a motion for summary judgment as well.

It is submitted that a fair and impartial analysis and comparison of Dr. Berlin's Affidavit with his deposition testimony will reveal that there are material issues of fact as to what Plough, Inc., did, but the fact remains that Plough, Inc. received the formulation and made a Sun-Bug product under the name Bug&Sun using the same formulations as Sun-Bug.

It is also noteworthy that the defendants have destroyed their files which conveniently permits them to disavow any knowledge of the contracts with Dr. Swartz's group and that they have marketed a product that was a "rip-off" of the Sun-Bug product.

Respectfully Submitted,

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-s Evans J. Carter, Esq. (BBO# 07660)
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DATED: October 9, 2001

(3)

Supreme Court, U.S.
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No. 02-1514

IN THE

Supreme Court of the United States

MITCHELL R. SWARTZ,

Petitioner,

v.

SCHERING-PLOUGH CORPORATION, PLOUGH U.S.A., SCHERING-PLOUGH HEALTHCARE PRODUCTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The only question presented by this case is whether the First Circuit Court of Appeals properly affirmed the district court's order granting summary judgment to the Respondents on a simple state law breach of contract claim.

CORPORATE DISCLOSURE STATEMENT

Schering-Plough HealthCare Products, Inc. hereby discloses that it is wholly-owned by Schering-Plough Corporation.

Schering-Plough Corporation hereby discloses that its shares of stock are publicly held, that it has no parent corporation, and that there is no publicly-held company that owns ten percent or more of its stock.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 219 F.3d 31 and is reproduced at Petitioners' Appendix ("Pet. App.") 32 (Appendix A). The report and recommendation of the chief magistrate judge of the district court is reproduced at Petitioner's Supplemental Appendix ("Pet. Supp. App.") SA1-24. The district court endorsed the chief magistrate judge's report and recommendation "adopted" on November 28, 2001.

PROVISIONS AT ISSUE

Respondents respectfully submit that no constitutional provision, treaty, statute, ordinance or regulation is at issue.

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner Mitchell Swartz ("Dr. Swartz" or "petitioner") seeks review of a judgment of the Court of Appeals for the First Circuit, affirming an order of the federal district court for the District of Massachusetts granting summary judgment in favor of Schering-Plough Corporation and Schering-Plough HealthCare Products, Inc. (collectively, "Schering-Plough").

On January 29, 1999, Dr. Swartz commenced this action in federal district court with claims ranging from breach of contract and negligence to trademark infringement, violations of civil rights and RICO violations.

On March 26, 1999, Schering-Plough moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss all claims against it. On June 17, 1999, the district court dismissed all but one of Dr. Swartz's claims; all that remained was a state law claim for breach of contract. Petition for Certiorari at 2.

On October 1, 2000, Schering-Plough moved for summary judgment on the breach of contract claim. On September 27, 2001, the chief magistrate judge of the district court issued a 36-page report and recommendation, recommending that summary judgment enter for Schering-Plough (the "Report and Recommendation"). Petitioner's

Supplemental Appendix ("Pet. Supp. App.") SA1-24. Dr. Swartz filed two separate objections to the Report and Recommendation. *See, e.g.*, Pet. Supp. App. SA25-27.[1]

On November 29, 2001, the district court adopted the Report and Recommendation and entered summary judgment in favor of Schering-Plough.[2]

On December 30, 1999, Dr. Swartz filed a notice of appeal. On September 24, 2002, having determined that argument was not necessary, the First Circuit affirmed the district court's order without a separate opinion, stating: "We have carefully reviewed the record in this case, including the briefs of the parties. We affirm the grant of summary judgment essentially for the reasons given by the magistrate in his report and recommendation dated September 27, 2001." *See* Pet. App. 32 (Appendix A).

B. Factual Background

Respondents hereby incorporate herein, in their entirety, the Facts as set forth in the Report and Recommendation. Pet. Supp. App. SA2-4. Respondents further incorporate

1. In the version appearing in his Supplemental Appendix, Petitioner altered the original text of the Report and Recommendation in two ways. First, he added bold emphasis to certain portions of the text that did not appear in the original Report and Recommendation without noting that the emphasis is added. *See, e.g.*, Pet. Supp. App. SA2-3, SA-4. Second, he has made [sic] notations where he deemed the text to be in error. *See, e.g.* Pet. Supp. App. SA-24. Upon review, however, the Report and Recommendation appears to be otherwise accurately reprinted.

2. References in Respondents' brief in opposition to the district court's findings refer to the findings set forth in the magistrate's Report and Recommendation, as adopted by the district court.

herein in their entirety factual materials set forth in the Discussion portion of the Report and Recommendation. Pet. Supp. App. SA-6-8; SA-9-11; SA-12-15; SA-15-17; and SA-22.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied because this case presents no issue of federal law, the questions presented for review by petitioner are not properly before this Court, and the First Circuit correctly affirmed the district court's order granting summary judgment to Schering-Plough. The district court correctly stated and applied the standards for summary judgment and consideration of evidence on summary judgment as well as the state law breach of contract principles.

1. This case presents none of the indicia customarily utilized to identify a matter worthy of expenditure of this Court's resources. Dr. Swartz attempts to obfuscate this fact by spinning a story of a mistreated *pro se* plaintiff. Peeling away the rhetoric and mischaracterizations from the petition for certiorari reveals Dr. Swartz's petition for what it truly is: a request that this Court ignore the scope of the First Circuit's order and grant certiorari so that it may second-guess an entire case worth of discovery rulings, factual findings and motion practice, and review the federal district court's application of black-letter state law contract principles.

a. This case does not present an important Constitutional or federal statutory issue warranting review by this Court. Nor does it raise any conflict among the federal courts requiring resolution by this Court. *See* Supreme Court

Rules 10, 11. Indeed, this case presents no issue of federal law whatsoever. Despite that Dr. Swartz would have this Court undo every order entered against him in the district court, the only issue that the First Circuit ruled upon was whether the district court properly granted summary judgment in favor of Schering-Plough. At issue, therefore, is only the First Circuit's decision affirming the District Court order granting summary judgment to Schering-Plough on one claim – a straightforward state law breach of contract claim. *See* Petition for Certiorari at 2 ("The Complaint in the District Court involves breach of contract. . . ."). This Court is not in the business of reviewing the application of state law. *See* Supreme Court Rule 10.

The only rulings that even come close to involving federal law are: (i) the District Court's decision to strike Dr. Berlin's affidavit that contradicted his earlier sworn deposition and affidavit testimony and (ii) the District Court's ruling that summaries of testimony attached to Dr. Swartz's affidavit in opposition to summary judgment were inadmissible under Fed. R. Civ. P. 56(e) and could not be considered on summary judgment. Both decisions were discretionary evidentiary rulings as to what materials the court would consider in deciding a motion for summary judgment. Those decisions were reviewable by the First Circuit only for "clear abuse of discretion." *See Torres v. E.I. Dupont De Nemours & Company*, 219 F.3d 13, 21 (1st Cir. 2000) (quotations omitted). These are hardly the sort of important federal issues worthy of this Court's attention.

b. Furthermore, this case presents a dispute between Dr. Swartz and Schering-Plough, the outcome of which will not affect anyone other than the litigants themselves. While Dr. Swartz seeks to have this Court

reexamine the evidence considered and facts found by the district court on summary judgment, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See also* Sup. Ct. R. 10 ("certiorari is 'rarely granted' when the petition asserts 'erroneous factual findings.'").

2. Further review of the decision below is unwarranted because the First Circuit correctly affirmed the district court's grant of summary judgment in favor of Schering-Plough. Indeed, Petitioner does not even purport to raise any claim of error by the First Circuit. He instead retells the same story he told to the First Circuit, claiming numerous "errors" by the district court. The district court, in adopting the Report and Recommendation, appropriately exercised its discretion in excluding Dr. Berlin's affidavit and the summaries of testimony attached to Dr. Swartz's affidavit and correctly stated and applied the summary judgment standard under Fed. R. Civ. P. 56 and state law to the breach of contract claim.

(a) The district court properly exercised its discretion to strike the affidavit of Dr. Robert Berlin filed in support of Dr. Swartz's opposition to summary judgment.

(i) Though the petitioner attempted to raise an issue of material fact by offering an affidavit of his purported business partner, Dr. Robert Berlin that contradicted Dr. Berlin's earlier affidavit and testimony, after the motion for summary judgment was filed, the district court applied well-settled principles of law in the First Circuit and properly exercised its discretion to strike the affidavit.

The law in the First Circuit is settled that "[w]hen an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994).

The district court examined and quoted Dr. Berlin's deposition testimony and the later-filed affidavit at length. Comparing the two, the court found that "Dr. Berlin's precise, detailed testimony in his affidavit contradicts his ambiguous, amorphous deposition testimony." Pet. Supp. App. SA-21. The court offered the following example:

> [A]t his deposition, Dr. Berlin had a "very vague" memory as to who allegedly sent the second package to Schering and that there was "some possibility" that he had done it. He also could not remember where that second package was purportedly sent. His testimony was that he thought that he "had to send a second sort of supporting something to someplace else," but that he did not "remember too well."
>
> By contrast, in his affidavit, Dr. Berlin states unequivocally that he himself sent out the second package to "the manager of new product ideas/ development" at Schering who thereafter "specifically acknowledged receipt of both packages and the materials from the S-B Group." Moreover, the second package was described as "includ[ing] the detailed written formula, actual

> product samples of our SUN-BUG sample packets and the appropriate packaging for our presentation.

Pet. Supp. App. SA-21.

The district court also noted that the affidavit was offered only after Schering-Plough filed its motion for summary judgment, Pet. Supp. App. SA-19 (citing *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994)), and noted that "no explanation whatsoever has been forthcoming to explain the striking differences in Dr. Berlin's recollections." Pet. Supp. App. SA-21. The district court thus struck the affidavit because "it was clearly filed in order to raise genuine issues of material fact so as to avoid the entry of judgment as a matter of law." Pet. Supp. App. SA-21.

(ii) The district court also properly refused to consider certain "summaries of admissions" appended to Dr. Swartz's affidavit in support of his opposition to summary judgment. The court found that the "summaries," which "both quote[d] and characterize[d] portions of [the deponents'] testimony" were "inadmissible and, consequently, [could not] be considered in deciding " the motion for summary judgment. *See, e.g.*, Pet. Supp. App. SA-15 n.12 (citing Fed. R. Civ. P. 56(e)).

(b) The district court properly found that Dr. Swartz had "failed to produce any admissible evidence to show either that he or the S-B Group entered into a confidentiality agreement with Schering or that any Sun-Bug Documents were transferred to Schering pursuant to such a confidentiality agreement." Pet. Sup. App. SA-21.

The court examined the deposition testimony of each of Dr. Swartz's purported partners. The court first noted that the testimony of Ms. Solomon and Ms. Berlin, two of Dr. Swartz's three purported partners was "crystal clear and unequivocal. Swartz's statements and the allegations notwithstanding, neither of these members of the S-B group delivered Sun-Bug Documents and information to Schering, nor did they have any discussions about Sun-Bug with any representative of Schering." Pet. Supp. App. SA-8-9. The court also noted that Dr. "Swartz does not contend either that he delivered anything to Schering or that he had any conversations with any Schering representatives." Pet. Supp. App. SA-6.

The district court concluded that Dr. Berlin remained the only possible member of the S-B Group who could have entered into a confidentiality agreement with, and delivered documents to, Schering. Pet. Supp. App. SA-9. Examining the deposition testimony of Harry Solmson, the court found that "Somson [sic] denied every [sic] having received any documents, product samples or technology about Sun-Bug or any comparable sunscreen/insect repellant combination product from Dr. Berlin or anyone else." Pet. Supp. App. SA-11. He also testified that "he never referred Dr. Berlin to anyone at Schering to call about the proposed product." *Id.* Finally, Solmson asserted that "he never came to any agreement whatsoever with any member of the S-B Group regarding Sun-Bug or any comparable sunscreen/insect repellant combination product." *Id.* Having stricken Dr. Berlin's contradictory affidavit, filed after Schering-Plough filed its motion for summary judgment, the court found that Dr. Swartz had not produced admissible evidence to defeat summary judgment. Pet. Supp. App. SA-21.

(c) The district court went one step further to find that

> even if Dr. Berlin's affidavit were to be considered and genuine issues of material fact were found respecting the existence of a confidentiality agreement and whether Sun-Bug Documents were given to Schering pursuant to it, [Dr. Swartz's] claim must fail given the utter dearth of evidence produced to establish a breach.

Pet. Supp. App. SA-21-22.

The district court recalled that "the alleged confidentiality agreement purportedly had as its terms that (1) whatever information was given to Schering '. . . would be kept confidential' and that Schering '. . . would proceed with good faith licensing negotiations at any time they chose to produce a dual action sunscreen product.'" Pet. Supp. App. SA-22 (citing *Swartz*, 53 F. Supp. 2d at 103). The court found that "to succeed, Swartz [had] to submit evidence to demonstrate, or from which it can be inferred, that Schering utilized any information in the Sun-Bug Documents in their product." Pet. Supp. App. SA-23. The court concluded that the "absence of evidence that Schering did not keep whatever was transferred 'confidential' or that Schering used or incorporated any of the information contained in the Sun-Bug Documents in the Schering product is fatal to the claim of breach." *Id.*

As the preceding section demonstrates, the district court correctly stated and applied the law governing summary judgment and breach of contract and correctly exercised its discretion in making evidentiary rulings on materials

presented in opposition to summary judgment. The First Circuit affirmed the grant of summary judgment essentially for the reasons set forth by the district court.

There is no error in the First Circuit's order. Indeed, petitioner does not even attempt to point to any error on the part of the First Circuit, nor does he demonstrate a conflict between the decision below and a decision of this Court or any other court of appeals on the issues actually presented to the district court and the First Circuit. Rather, the petitioner argues that the summary judgment decision below somehow contravened an earlier order on Schering-Plough's motion to dismiss. Petitioner raises a litany of questions on appeal that have nothing to do with the underlying case, the decisions of the district court or the First Circuit, and which fundamentally rely on misstatements of facts and misapplications of law. None of the petitioner's arguments justify review by this Court of the First Circuit's decision, as discussed further below.

3. To the extent that the petitioner otherwise claims error in the orders of the First Circuit or the district court, the petitioner's arguments are unavailing.

(a) As petitioner acknowledges, the underlying case involved only a breach of contract claim. Arguments relating to the standards of review regarding whether two inventions are identical under 35 U.S.C. § 102 have nothing to do with the claim that Schering-Plough entered into a confidentiality agreement with Dr. Swartz or one of his purported partners.

(b) Dr. Swartz's petition for certiorari relies heavily on an argument that the "Court has not followed the standards of review established by Judge Young's Order and

Memorandum which accurately, precisely and substantively, discusses 'information' and not merely documents. . . ." Petition for Certiorari at 7. Not only is Dr. Swartz's argument factually inaccurate, but the order on Defendants' motion to dismiss does not control a ruling on summary judgment. First, the Report and Recommendation expressly discussed both documents and information. *See, e.g.*, Pet. Supp. App. SA-8, 11, 22-23. Second, the order to which Petitioner refers is an order dismissing all but the contract claim at the pleading stage of the underlying case. *See* Pet. Supp. App. SA-2-4. On a motion for summary judgment, as opposed to a motion to dismiss at the pleading stage, it is the admissible evidence that the court considers and not the allegations of the pleadings.

(c) The petitioner argues that summary judgment was inappropriately entered because he was not allowed sufficient discovery. At the time that Schering-Plough moved for summary judgment, a lengthy discovery period had closed. Dr. Swartz's argument is actually that he does not agree with the district court's rulings on discovery, including refusing to allow Dr. Swartz to misuse discovery devices to harass Schering-Plough and its employees.

(d) Dr. Swartz has never established any error or abuse of discretion by the district court or the First Circuit. Dr. Swartz apparently expects this Court to second-guess nearly every order entered against him in the district court. While petitioner claims bias in every single order that did not go his way, he points to nothing other than the outcomes of the motions themselves to demonstrate any alleged error, abuse of discretion, or bias. This is nothing new. Indeed, Dr. Swartz has, since the inception of the district court case, consistently and falsely accused Schering-Plough, its counsel

and the courts (including various, specific attacks on Chief Judge Young, Judge Gertner and Chief Magistrate Judge Collings of the district court, alleging numerous improprieties). The Petition for Certiorari is no exception.

For example, in objecting to the Report and Recommendation of Chief Magistrate Judge Collings, Dr. Swartz claimed that the Chief Magistrate did not handle the district court matter impartially, that he acted with "bias and prejudice," and that specifically with regard to the Report and Recommendation, "he was arbitrary and capricious." *See* Pet. Supp. App. SA-26; *see generally* SA-25-27. Dr. Swartz now weaves these very same unfounded rantings throughout his Petition for Certiorari, including allegations that Schering-Plough did not produce discovery and that the Chief Magistrate "covered up" Schering-Plough's failures to respond to discovery and "came back into the case to protect [Schering-Plough] and deny [Dr. Swartz] even the appearance of justice." Petition for Certiorari at 16. Never has Dr. Swartz been able to point to anything to back up his reckless assertions, and he does not do so now.

(e) Dr. Swartz attempts inappropriately to exploit his on-again, off-again *pro se* status. The simple fact, however, is that while Dr. Swartz proceeded *pro se* during much of the litigation, he was represented by counsel of his choosing as of the date of his deposition, August 22, 2000, throughout the summary judgment process, and in connection with his objections to the Report and Recommendation. *See, e.g.*, Pet. Supp. App. SA-27. Thus, not only are Dr. Swartz's attempts to gain advantage by reference to his *pro se* appearance improper and irrelevant, they are, for the purpose of attacking summary judgment, without factual basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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